CLERK'S COPY.

CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~486~~ 14

WILLIAM A. SHERMAN, M. F. COCHRANE, AND J. B. SANFORD, CONSTITUTING THE BOARD OF STATE HARBOR COMMISSIONERS OF THE STATE OF CALIFORNIA, ETC.,

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED NOVEMBER 19, 1929

(34,617)

(34,617)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 486

WILLIAM A. SHERMAN, M. F. COCHRANE, AND J. B. SANFORD, CONSTITUTING THE BOARD OF STATE HARBOR COMMISSIONERS OF THE STATE OF CALIFORNIA, ETC.,

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 3, 1929

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

No. 5839

WILLIAM A. SHERMAN, M. F. COCHRANE, and J. B. SANFORD, Constituting the Board of State Harbor Commissioners of the State of California, Operating the State Belt Railroad, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee

Upon Appeal from the United States District Court for the Northern District of California, Southern Division

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Questions of Law to the Supreme Court of the United States under Section 239 of the Judicial Code—Filed Nov. 12, 1929

STATEMENT OF CASE

This action was brought by the United States to recover statutory penalties for nine separate alleged violations of the Federal Safety Appliance Act and amendments thereto.

In the complaint the defendants were named and designated as "William A. Sherman, M. F. Cochrane and J. B. Sanford, Constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad."

[fol. 2] The issues were joined, jury trial duly waived, and upon a written stipulation of the facts, the trial court entered a judgment for $900.00 against the defendants as so named and designated. From this judgment the defendants have appealed and the cause has been duly submitted for decision.

The Facts

From the stipulation of facts it appears:

1. That the acts or omissions constituting the alleged violations of the Act all occurred upon and in the course of

the operation of what is known as the State Belt Railroad, owned and operated by the state of California and located wholly within the city of San Francisco.

2. The railroad is near the harbor and runs approximately parallel with the water front, between the wharves on one side and numerous industrial plants on the other. It is about five miles in length with short spurs connecting with the industrial plants and approximately 45 wharves owned by the state of California.

The line also has a physical connection with the tracks of the Southern Pacific Railroad Company from which it receives and to which it delivers cars.

The wharves belonging to the State are used by the freight car ferries of the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, the Western Pacific Railway Company, and the Northwestern Pacific Railway Company, all common carriers engaged in interstate commerce by railroad; and the Belt Line receives from and delivers to these ferries freight cars belonging to the several companies.

Adjacent to the main line of the Belt Line and connecting therewith are certain freight yards of these four interstate carriers in which all switching is done by it, and all cars [fol. 3] going into and out of these yards are so hauled by it.

These yards are owned by the State but under agreement or lease with the State the interstate carriers so use them.

Spur tracks also connect with certain wharves belonging to the State where freight from incoming steamers is transferred to fregiht cars and transferred from freight cars to outbound steamers from and to points within and without the State.

None of the tracks, either main or spur, is ever used by any of these interstate carriers and no locomotive other than the locomotives of the Belt Line ever moves on any part thereof.

The Belt Line has no cars or other rolling stock with the exception of locomotive engines.

The Belt Line maintains a roundhouse but no repair shops. If by its inspectors cars are found to be defective under the requirements of the Federal Safety Appliance Act, minor repairs are made by them where the cars are

found, or in the roundhouse, and if major repairs are required the cars are sent to the repair shops maintained by the interstate carriers in their yards.

3. The industries (approximately 175) and the 45 wharves and car ferries referred to are served exclusively by the Belt Line in so far as the movement of loaded and empty cars is concerned. It moves all carload freight from these industries and wharves destined and consigned to points both within and without the State either on or beyond the lines of the four interstate carriers and it likewise receives from these carriers all carload shipments destined and consigned to these industries and delivers the same to them. It also delivers to the various steamship lines using the 45 wharves, cars, loaded and unloaded, for delivery to the carrier railroads and likewise receives cars from such railroads for delivery to the wharves for further transportation to points within and without the State.

[fol. 4] The Belt Line also moves over its line all cars, loaded and empty, between the yards of the four railroads referred to and the various wharves and transfer tracks. These last mentioned cars are for shippers or consignees who do not have industrial tracks or private sidings of their own but obtain cars and load them themselves and hire the Belt Line to transfer such cars either to the carrier roads or along the water front as the case may be. These cars are loaded by the shippers before the Belt Line switches the same and are unloaded by the shippers after it spots them for unloading. No freight is ever loaded or unloaded by the Belt Line.

Without discrimination the Belt Line moves all cars offered to it by the railroads in question, the various steamship lines using the 45 wharves, and the 175 industries referred to.

The Belt Line also hauls in like manner all cars moving between the Presidio and the steamship docks, car ferry wharves and transfer tracks.

4. The Belt Line is not a party to any through rate for the transportation of any shipment, nor does it move a shipment on any through waybill, nor does it issue any waybill or give any receipt whatever. It charges a flat rate for moving a car between two points, the rate for a loaded

car being a little higher than for an empty. These charges are uniform without consideration of destination. Occasionally it handles baggage and Pullman cars, principally between the Presidio and the various wharves or the Southern Pacific transfer docks, for which it also charges a flat rate.

5. The Belt Line is operated by the State for the purpose of facilitating commerce of the Port of San Francisco, without any profit being derived therefrom. The charges made for the services rendered by the line are made [fol. 5] pursuant to the authority conferred by Section 2524 of the Political Code of California which authorizes collection of such an amount of revenue as will enable the State officers to perform their duties as required of them by authority of Article IX of the Political Code. The defendants are appointive State officers and constitute what under the State statutes is designated as the Board of State Harbor Commissioners. They do not personally operate or supervise the operation of the Belt Line. It is operated under the immediate and personal supervision of a superintendent who is appointed and holds office at the pleasure of the Board of State Harbor Commissioners and is under the supervision and control of that Board. His subordinates, inspectors, engineers, and yardmen employed in the operation of the railroad are Civil Service employees of the State, except in cases of emergency employment due to an unusual rush of business. All persons having to do with the maintenance and operation of the road are employees and servants of the State. Among such employees at the times mentioned in the complaint were five inspectors, whose duty it was to make inspections of all appliances covered by the Federal Safety Appliance Act and the orders of the Interstate Commerce Commission issued pursuant thereto.

6. It is in terms stipulated that the defendants "did not, in any manner, personally participate in, and had no personal knowledge whatsoever of the commission of any of the alleged violations of the Federal Safety Appliance Act set forth in the causes of action, or any of them, in the complaint herein. That if the violations * * *, or any of them, occurred the said violation so occurred without the personal knowledge of defendants, or any of them, and with-

out the consent of defendants, or any of them, and contrary to the orders and instructions of defendants."

[fol. 6] 7. Further facts are stipulated in respect to the specific alleged violations from which it appears that if what was done and omitted had been done or omitted by an ordinary common carrier engaged in interestate commerce, such acts and omissions would admittedly constitute violations of the Safety Appliance Act.

Questions of Law

The Judges of the United States Circuit Court of Appeals for the Ninth Circuit, being in doubt, hereby certify to the Supreme Court of the United States questions of law arising upon the foregoing statement of facts and material to a decision of the above entitled case now pending on appeal:

1. Is the State Belt Railroad a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act?

2. If No. 1 is answered affirmatively, is the State Belt Railroad (owned and operated by the State of California) subject to the Safety Appliance Act, which by general language imposes duties upon "any common carrier engaged in interstate commerce" but does not expressly refer to a State or other sovereignty? (Guarantee Company v. Title Guaranty Company, 224 U. S. 152, 155, et seq.)

3. If this question also is answered in the affirmative, and if the complaint and the judgment be construed as running against the members of the Board of State Harbor Commissioners, in their official capacity, and hence in a sense against the State, did the District Court have jurisdiction of the action?

[fol. 7] 4. Upon the other hand, if the judgment be deemed to be against the defendants in their private capacity can it be sustained in view of the considerations:

(a) That the Act imposes penalties only upon the "carrier"; and

(b) That the defendants did not own or personally manage or operate the Belt Line, and the alleged infractions of the law were due to no act or omission upon their part

and the wrong-doing was not only without their participation, consent, and knowledge but was contrary to their orders and instructions?

Frank H. Rudkin, Frank S. Dietrich, Curtis D. Wilbur, Judges.

[File endorsement omitted.]

A true copy. Attest November 12, 1929.
Paul P. O'Brien, Clerk. (Seal United States Circuit Court of Appeals, Ninth Circuit.)

Endorsed on cover: File No. 34,617. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 486. William A. Sherman, M. F. Cochrane, and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, etc., vs. The United States of America. (Certificate.) Filed November 19, 1929. File No. 34,617.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1930

No. ~~480~~ 14

WILLIAM A. SHERMAN, M. F. COCHRANE, AND J. B. SANFORD, CONSTITUTING THE BOARD OF STATE HARBOR COMMISSIONERS OF THE STATE OF CALIFORNIA, ETC.,

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED MAY 5, 1930

(34,617)

(34,617)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 486

WILLIAM A. SHERMAN, M. F. COCHRANE, AND J. B. SANFORD, CONSTITUTING THE BOARD OF STATE HARBOR COMMISSIONERS OF THE STATE OF CALIFORNIA, ETC.,

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 16, 1930

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

LEON E. MORRIS, Esq., Crocker First National Bank Bldg., San Francisco, California,
Attorney for Appellants.

GEO. J. HATFIELD, Esq., United States Attorney, Post Office Bldg., San Francisco, California,
Attorney for Appellee.

In the District Court of the United States for the Northern District of California, Southern Division.

No. 17,435.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM A. SHERMAN, M. F. COCHRANE and J. B. SANFORD, Constituting THE BOARD OF STATE HARBOR COMMISSIONERS OF THE STATE OF CALIFORNIA, Operating THE STATE BELT RAILROAD.

Defendants.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad in and about San Francisco, in the State of California, within the jurisdiction [2] of this court, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the lift arm of the uncoupling lever being missing from said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

For a third cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on October 16, 1925, hauled on its standard gauge line of railroad one freight car, to wit: S. P. gon-

dola No. 53261, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad in and about San Francisco, in the State of California, within the jurisdiction of this court, when the height of the drawbar on the "A" end of said car, measured perpendicularly from the level of the tops of the rails to the center line of said drawbar, was thirty (30) inches, and when the height of said drawbar should not have been less than thirty-one and one-half (31½) inches, as prescribed by an order of the Interstate Commerce Commission of October 10, 1910, which order was made in pursuance of the provisions and requirements of Section 3 of the aforesaid Act of April 14, 1910. [3]

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of one hundred dollars.

For a fourth cause of action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531) as amended by an Act approved April 1, 1896 (contained in 29 Statutes

at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), defendant, on October 16, 1925, hauled on its line of railroad one car, to wit: W. P. box No. 15049, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad in and about San Francisco, in the State of California, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the uncoupling lever keeper on the said end of said car being broken, this necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

For a fifth cause of action plaintiff alleges that defendant [4] is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), defendant, on Oceober 17, 1925, hauled on its line of railroad one car, to wit: W. P. box No. 30114, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad in and about San Francisco, in the State of California, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the end casting on the said end of said car being broken, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

For a sixth cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of [5] Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on October 19, 1925, hauled on its line of railroad one car, to wit: S. F. M. I. & M. Co. flat No. 4020, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad in and about San Francisco, in the State of California, within the jurisdiction of this court, when the hand-brake on said car was out of repair and inefficient, the hand brake shaft being bent, and when said car was not equipped with an efficient hand brake, as required by Section 2 of the aforesaid Act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of one hundred dollars.

For a seventh cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on October 22, 1925, hauled on its line of railroad one car, to wit: U. C. R. gondola No. 20031, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad in and about San Francisco, in the State of California, within the jurisdiction of this court, when the hand-brake on said car was out of repair and inefficient, the hand brake chain being broken, and when said car was not equipped with an efficient hand-brake, as required by Section 2 of the aforesaid Act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of [6] said Act of Congress, said defendant is liable to plaintiff in the sum of one hundred dollars.

For an eighth cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at

Large, page 943), defendant, on October 23, 1925, hauled on its line of railroad one car, to wit: U. C. M. X. flat No. 69087, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad in and about San Francisco, in the State of California, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "B" end of said car was out of repair and inoperative, the uncoupling lever and lock lift being missing from said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars. [7]

For a ninth cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance

Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), defendant, on October 26, 1925, hauled on its line of railroad one car, to wit: S. P. box No. 84500, *over a*

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad in and about San Francisco, in the State of California, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "B" end of said car was out of repair and inoperative, the lock lift being disconnected from lock block of coupler on said end of said car, thus necesitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

WHEREFORE, plaintiff prays judgment against said defendants in the sum of nine hundred dollars and its costs herein expended.

GEORGE J. HATFIELD,
United States Attorney.

[Endorsed]: Filed Nov. 17, 1925. [8]

[Title of Court and Cause.]

NOTICE OF MOTION TO DISMISS.

To the Plaintiff Herein, and to Geo. J. Hatfield, Esq., Its Attorney:

You and each of you will please take notice that the defendants herein, the Board of State Harbor Commissioners of the State of California, through its attorney, having appeared specially for the purpose of objecting to the jurisdiction of this court, will on Monday, the 14th day of December, 1925, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of said District Court, Second Division thereof, in the Post Office Building, 7th and Mission Streets, at San Francisco, California, move said court to dismiss the above-entitled action on the following grounds:

I.

That said court has no jurisdiction over said defendants.

II.

That said court has no jurisdiction over said de-

fendants as to the matters and things set forth in said complaint because of the fact that the Constitution of the United States forbids a [9] state being sued without its consent in any court except the Supreme Court of the United States.

III.

That said court has no jurisdiction of the matters involved in this action, in that said action is one between the United States of America and the State of California; and that the proper place of trial is the Supreme Court of the United States.

IV.

That said court has no jurisdiction over the defendants herein sued as the Board of State Harbor Commissioners of the State of California, a political arm or agency of the State of California, in that said defendants are merely officers of the State of California and acting as such as and for and in behalf of the People of the State of California; and further in that said action is between the United States of America and the State of California in violation of Art. III, Sec. 2 of the Constitution of the United States.

V.

That the complaint in this action is without sufficient facts to constitute a cause of action.

VI.

That William A. Sherman, M. F. Cochrane and J. B. Sanford, as and constituting the Board of State Harbor Commissioners of the State of Cali-

fornia, collectively as individuals, or as said Board, or separately as individuals, are not amenable, while acting as such Board of State Harbor Commissioners and representing the People of the State of California, and while carrying out the laws of the State of California,—to any jurisdiction other than the Supreme Court of the United States, or any laws other than those of the State of California, and is violative of the first ten amendments to the Constitution of the United States. [10]

VII.

That the State of California as a sovereign state, and as represented by said Board of State Harbor Commissioners, is immune from suits and can not be sued without its consent in any court of the United States other than the Supreme Court of the United States; and that said action is in violation of the Eleventh Amendment to the Constitution of the United States.

VIII.

That it does not appear, nor can it be ascertained, from the complaint on file herein, how or in what manner, or at what times the defendants herein were operating said Belt Railroad as "common carriers engaged in interstate commerce by railroad in the State of California."

Said motion will be made upon the grounds hereinbefore set forth.

Said motion will be based upon this notice of motion and upon all the papers, files, records and

proceedings in this action to which reference is hereby made for the purpose of this motion.

Dated: December 5, 1925.

W. T. PLUNKETT,

Attorney for Defendants William A. Sherman, M. F. Cochrane and J. B. Sanford, Constituting the Board of State Harbor Commissioners of the State of California, Operating the State Belt Railroad.

Service of the within notice by copy admitted this 5 day of Dec., 1925.

GEORGE J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 5, 1925. [11]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Thursday, the 15th day of March, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—MARCH 15, 1928—ORDER OVERRULING DEMURRER.

After hearing R. M. Lyman, Esq., Assistant United States Attorney, IT IS ORDERED that the

demurrer to the complaint herein be and the same is hereby overruled, * * * [12]

[Title of Court and Cause.]

ANSWER.

Come now defendants above named and not waiving any objection to the jurisdiction of this court heretofore made, answer the complaint of plaintiff, and deny and allege as follows, to wit:

I.

Defendants, and each of them, deny, generally and specifically, each and every, all and singular, the allegations in said complaint, and each and every cause of action thereof contained.

And as and for a second, separate and distinct answer and defense to plaintiff's complaint, and each and every cause of action therein contained, defendants deny and allege as follows, to wit:

I.

Defendants allege that at the times mentioned in plaintiff's complaint, they were the duly appointed and acting Board of State Harbor Commissioners of the State of California, and that all acts done by them as such Harbor Commissioners, were done and performed as a political arm or agency of the State of California, in the performance [13] and exercise of a Governmental function of the State of California.

That the State Belt Railroad is owned and operated by the State of California, and that this action against defendants constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad, is an action against the State of California.

III.

That this court has no jurisdiction over an action by the United States of America against the State of California; that the Supreme Court of the United States is the only court having jurisdiction over such an action.

And as and for a third, separate and distinct answer and defense to plaintiff's complaint, and each and every cause of action therein contained, defendants deny and allege as follows, to wit:

I.

Defendants hereby refer to each and every, all and singular the allegations contained in Paragraphs I and II of their second separate answer and defense hereinabove contained, and by such reference make the same a part hereof of the same force and effect as if set forth in full herein.

II.

That the Acts of Congress specified in plaintiff's complaint, to wit, Federal Safety Appliance Acts, provide that common carriers violating the provisions of said acts shall be liable to a penalty therefor.

III.

Defendants deny that the United States of America has any right to assess a penalty against, or collect a penalty from, the [14] State of California, and allege that the State of California is immune from suits to enforce or collect such a penalty.

And as and for a fourth, separate and distinct answer and defense to plaintiff's complaint, and each and every cause of action therein contained, defendants deny and allege as follows, to wit:

I.

Defendants, and each and all of them, deny that at the times mentioned in plaintiff's complaint, or any of them, they, or any of them, were a common carrier engaged in interstate commerce by railroad in the State of California, or elsewhere.

II.

Defendants allege that the State Belt Railroad was, at all the times mentioned in plaintiff's complaint, and now is, owned and operated by the State of California; that if said State Belt Railroad is a common carrier engaged in interstate commerce, then the State of California is the said common carrier.

III.

That the Acts of Congress, to wit, the Federal Safety Appliance Acts alleged in plaintiff's complaint make the matters therein alleged unlawful for any common carrier and provide that any common

carrier violating the provisions of said Acts shall be liable to a penalty. None of the Federal Safety Appliance Acts referred to in plaintiff's complaint authorize or provide for the assessment of any penalty against any officer or employee of the common carrier, or against any individual whatsoever, other than the common carrier itself.

IV.

Defendants deny that they, or any of them, individually, are liable to plaintiff for any penalty under the said Federal Safety Appliance Acts and deny that said Federal Safety Appliance Acts [15] authorize or provide for the assessment or collection of any penalty against them individually.

And as and for a fifth, separate and distinct answer and defense to plaintiff's complaint, and each and every cause of action therein contained, defendants deny and allege as follows, to wit:

I.

Defendants, and each and all of them, deny that at the times mentioned in plaintiff's complaint, or ever, or at all, they personally operated or supervised the operation of the State Belt Railroad and deny that they personally participated in or had any personal knowledge whatsoever of the commission of any of the alleged violations of the Federal Safety Appliance Act set forth in the causes of action, or any of them, in plaintiff's complaint.

Defendants allege that if the violations of the Federal Safety Appliance Act alleged in plaintiff's

complaint, or any of them, occurred, the said violations so occurred without the personal knowledge of defendants, or any of them, and without the consent of defendants, or any of them, and contrary to the orders and instructions of defendants.

II.

That the said State Belt Railroad is operated under the immediate supervision of superintendent and by subordinate employees, to wit, inspectors, engineers, yardmen, etc., all of whom are civil service employees, except in cases of emergency employment, and that said superintendent and employees, and all of them, were properly employed and were and are in the service of the State of California.

III.

Defendants deny that they, or any of them, are liable to plaintiff in the sum specified in plaintiff's complaint, or any sum, by reason of any violations of said Acts of Congress specified in [16] said complaint, to wit, the Federal Safety Appliance Acts.

And as and for a sixth, separate and distinct answer and defense to plaintiff's complaint, and each and every cause of action therein contained, defendants deny and allege as follows, to wit:

I.

Defendants allege that subsequent to the times mentioned in plaintiff's complaint, and subsequent to the commencement of the above-entitled ac-

tion, they were succeeded in office as the Board of State Harbor Commissioners of the State of California by C. L. Tilden, Frank C. Sykes and Paul Scharrenberg, and that said C. L. Tilden, Frank C. Sykes and Paul Scharrenberg ever since their said appointments, have been and now are, the duly qualified and acting Board of State Harbor Commissioners of the State of California.

WHEREFORE, defendants pray that plaintiff take nothing by this action, and that they be hence dismissed and have judgment against plaintiff for their costs of suit herein expended, and for such other and further relief as to the Court may seem proper.

LEON E. MORRIS,
Attorney for Defendants.

Due service and receipt of a copy of the foregoing answer is hereby admitted this 25th day of July, 1928, and IT IS HEREBY STIPULATED that specific denials of the allegations of the complaint and verification of the answer be, and they hereby are, waived.

GEO. J. HATFIELD,
United States Attorney,
By R. M. LYMAN, Jr.,
Assistant United States Attorney,
M. C. LIST,
Special Assistant to the United States Attorney,
Attorneys for Plaintiff.
LEON E. MORRIS,
Attorney for Defendants.

[Endorsed]: Filed July 25th, 1928. [17]

In the Southern Division of the United States District Court for the Northern District of California.

No. 17,435.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM A. SHERMAN, M. F. COCHRANE and J. B. SANFORD, Constituting THE BOARD OF STATE HARBOR COMMISSIONERS OF THE STATE OF CALIFORNIA, Operating THE STATE BELT RAILROAD.

Defendants.

JUDGMENT.

This cause having been submitted to the Court upon a stipulation of facts, and the Court, after due deliberation having rendered its decision and ordered that judgment be entered herein in favor of plaintiff and against the defendants for the sum of nine hundred and no/100 ($900.00) dollars, and for costs:

Now there*of*, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that United States of America, Plaintiff, do have and recover of and from William A. Sherman M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad,

Defendants, the sum of nine hundred and no/100 ($900.00) dollars, together with its costs herein expended taxed at $26.60.

Judgment entered February 25th, 1929.

WALTER B. MALING,
Clerk. [32]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 25th day of November, 1925, the above-entitled action was commenced by the filing of a complaint and the issuance of a summons; that thereafter, and on or about the 5th day of December, 1925, defendants appeared therein and filed a motion to dismiss said action, which said motion was thereafter, to wit, on or about the 15th day of June, 1927, noticed for hearing by the attorney for plaintiff as a demurrer and was set down for hearing by said Court, and the hearing thereof regularly continued from time to time thereafter;

AND BE IT FURTHER REMEMBERED that on the 15th day of March, 1928, the above-entitled court, Honorable Frank H. Kerrigan, United States District Judge, presiding, duly and regularly made and filed an order overruling the demurrer of defendants to said complaint.

Thereupon, defendants moved and obtained leave to file and did file and answer to the complaint on file in said action; [33]

AND BE IT FURTHER REMEMBERED that the above-entitled cause came on regularly for trial before the above-entitled court sitting without a jury, a jury having been waived by both parties, on July 25th, 1928, Honorable A. F. St. Sure, United States District Judge, presiding, Richard M. Lyman, Jr., Esq., Assistant United States Attorney, appearing as attorney for plaintiff, and Leon E. Morris, Esq., appearing as attorney for defendants, whereupon the following proceedings were had.

The parties thereupon made and filed the following stipulation in writing:

(Title of Court and Cause.)

WAIVER OF JURY AND STIPULATION OF FACTS.

Come now the plaintiff and defendants in the above numbered and styled cause by their respective attorneys and hereby stipulate and agree:

1. That this cause may be heard and determined by the Court, a jury being expressly waived.

2. That the following may be considered by the Court as facts in the case in any trial thereof, to have the same weight and effect as if oral testimony or documentary evidence had been introduced to prove the same.

I.

That defendants were, during the times mentioned in the said causes of action, and each of them, the duly qualified and acting Board of State

Harbor Commissioners of the State of California. That the said Board of State Harbor Commissioners are officers of the State of California, appointed by the Governor, confirmed by the Senate of the State of California, and hold office at the pleasure of the Governor. [34]

That said Board of State Harbor Commissioners as officers of the State of California, have charge of the administration of the Harbor of San Francisco, California, and in connection therewith, of the administration of the State Belt Railroad; that said State Belt Railroad is owned and operated by the State of California and is located wholly within the city and county of San Francisco, and that all of the property administered by the Board of State Harbor Commissioners is owned by the State of California.

That all revenue received for services rendered by the State Belt Railroad is paid to defendants as such Board of State Harbor Commissioners. The laws of the State of California provide that all moneys collected by the Board of State Harbor Commissioners shall be paid into the State Treasury at least once each month, and be credited to the San Francisco Harbor Improvement Fund, except so much thereof as may be necessary to pay the salaries of the officers and employees, office rent, cost of office furniture, books, stationery, lights, fuel, expense of dredging, expense of pile driving and piles, expense of preserving piles and timber, cleaning the wharves and bulkheads, legal and other

incidental expenses, and in addition, ten thousand dollars per month for urgent repairs.

The said laws of the State of California further provide that for all sums of money paid by the Commissioners, except those hereinabove mentioned, drafts shall be drawn by them on the Controller of the State countersigned by the secretary of the Board, and the Controller of the State shall draw his warrant on the State Treasurer, who shall pay the same out of any money in said treasury credited to the San Francisco Harbor Improvement Fund.

II.

That the said State Belt Railroad now is, and for about [35] one year last past, has been operated under the immediate supervision of J. H. Wasserburger, superintendent; that during the year 1925, and at the times involved in all of the causes of action hereinafter more specifically mentioned, the said State Belt Railroad was operated under the immediate supervision of P. J. McGinty, superintendent; that the said superintendents of the said State Belt Railroad were appointed by the said Board of State Harbor Commissioners and hold office at the pleasure of the said Board of State Harbor Commissioners and are under their general supervision and control as such Board of State Harbor Commissioners; that the inspectors, engineers and yardmen employed in the operation of said State Belt Railroad are civil service employees, except in cases of emergency employment due to unusual rush of business; that said regular em-

ployees, in order to qualify as civil service employees, must pass an examination for their respective positions; that their standing on the eligible list is determined by the Board of Examiners, who pass on their merits and rate them accordingly. That said superintendents, inspectors, engineers, yardmen and other employees engaged in the operation of the State Belt Railroad, and all of them, are employees and servants of the State of California. That among said employees were and are five (5) inspectors, whose duty it was and is to make inspections of all appliances covered by the Federal Safety Appliance Acts and the orders of the Interstate Commerce Commission issued pursuant to the provisions thereof; that said inspectors, at the times involved in the said causes of action herein sued upon, ever since have, and still do make repairs to cars found to be defective under the requirements of the Federal Safety Appliance Act of such repairs are of the kind and character that can be made outside of a major repair-shop; that said minor repairs were made by said [36] inspectors where said cars were found to be defective or at the nearest available point; that certain additional repairs were and are made at th Roundhouse of the State Belt Railroad.

That said State Belt Railroad maintains no repair-shops and that the various carriers delivering cars to the State Belt Railroad maintain no repair-shops in their yards, at which the cars are delivered to the State Belt Railroad for handling.

III.

That defendants, William A. Sherman, M. F. Cochrane and J. B. Sanford, did not at the times herein involved, and the present Board of State Harbor Commissioners does not now personally operate or supervise the operation of the State Belt Railroad. That they did not, in any manner, personally participate in, and had no personal knowledge whatsoever of the commission of any of the alleged violations of the Federal Safety Appliance Act set forth in the causes of action, or any of them, in the complaint herein. That if the violations of the Federal Safety Appliance Act alleged in plaintiff's complaint, or any of them, occurred the said violation so occurred without the personal knowledge of defendants, or any of them, and without the consent of defendants, or any of them, and contrary to the orders and instructions of defendants.

IV.

That the State Belt Railroad is located wholly within the City and County of San Francisco, State of California, as aforesaid, and extends the full length of the Embarcadero and Jefferson Street to the Presidio, a distance of approximately five (5) miles. The State Belt Railroad has a physical connection with the tracks of the Southern Pacific Company near the Embarcadero and Townsend Street; its tracks also run on to wharves owned by the State of California, and [37] used by freight-car ferries of the Southern Pacific Company, the Atchison, Topeka and Santa Fe Railway

Company, the Western Pacific Railway Company, and the Northwestern Pacific Railway Company, all common carriers engaged in interstate commerce by railroad. Adjacent to its main line of road and connecting therewith, are certain freight-yards of the four interstate carriers just mentioned, in which all switching is done by the State Belt Railroad, and all cars going into and out of those yards are so hauled by the State Belt Railroad. These yards are owned by the State of California, but by agreements with three of the roads (by lease with the Santa Fe) are used by them. The tracks of the State Belt Railroad also run on to about forty-five (45) wharves owned by the State of California, on which wharves freight is loaded onto and unloaded from cars from and on to steamers going to and coming from, points within and without the State of California. At various points along its line, and with which the State Belt Railroad has trackage connections, are located about one hundred and seventy-five (175) industries. None of the tracks of said State Belt Railroad herein mentioned are ever used by any of the carrier roads and no locomotive, other than the locomotives of the State Belt Railroad, ever moves over any part thereof.

V.

That one hundred and seventy-five (175) industries and forty-five (45) wharves and car ferries referred to are served exclusively by the State Belt Railroad, in so far as the movement of loaded and empty cars are concerned. The State Belt

Railroad moves all carload freight from these industries and wharves destined and consigned to points both within and without the State of California, either on or beyond the lines of the four interstate carriers. It likewise receives from these four carriers, carload shipments of [38] freight, originating within and without the State of California and destined and consigned to industries on the line of the State Belt Railroad, and delivers same to the consignees. It also delivers to the various steamship lines using the forty-five (45) wharves in question, cars, loaded and unloaded, for delivery to the carrier railroads, and likewise receives cars from such carrier roads for delivery to such wharves, for further transportation to points within and without the State of California. The State Belt Railroad also moves over its lines all cars, loaded and empty, between the yards of the four railroads referred to and the various wharves and transfer tracks heretofore mentioned. These last-mentioned cars are either for shippers or consignees who do not have industrial tracks or private sidings of their own, who obtain cars and load them themselves, and hire the State Belt Railroad to transport such cars either to the carrier roads or along the waterfront as the case may be. These cars are loaded by shippers before the State Belt Railroad switches the same and are unloaded by the shippers after the State Belt Line spots them for unloading. No freight is ever loaded or unloaded by said State Belt Railroad. Of all the cars and movements mentioned herein, no discrimination is made

between cars owned by railroads operating within the State of California and those operating wholly without. The State Belt Railroad moves all cars offered to it by the railroads in question, the various steamship lines using the forty-five (45) wharves, and the one hundred and seventy-five (175) industries referred to. The cars used by the steamship companies are turned over to the State Belt Railroad for hauling in the same manner that cars are received from the carrier roads, i. e., the cars are furnished by the steamship companies and are committed to the State Belt Railroad for the movement requested and for no other purpose. For such services performed for the steamship companies [39] in hauling said last-mentioned cars, the usual switching charge is made just as in the matter of cars received from, and delivered to, carrier roads. The State Belt Railroad also moves between the Presidio and the steamship docks, car ferry wharves and transfer tracks heretofore mentioned, cars originating without the State of California and consigned to the Presidio, or *vice versa.*

VI.

The State Belt Railroad is not a party to any through rate for the transportation of any shipment from point of origin to its final destinations, nor does it move same on any through waybill, nor does it issue any waybill or give any receipt whatever. The State Belt Railroad charges a flat rate for moving a car between two points, the rate for a loaded car being a little higher than for an

empty car. These charges are uniform without any consideration as to the destination. It occasionally handles baggage and Pullman cars, principally between the Presidio and the various wharves or the Southern Pacific Transfer tracks in question, for which it also charges a flat rate. For inbound freight shipments, cars are moved to points on the State Belt Railroad on so-called "switch lists," made out by the carrier or steamship line, which shows the number and initials of the car, whether loaded or empty, and points of delivery or final destination on the State Belt Line. The original waybill is retained by the carrier delivering the car to the State Belt Railroad; this shows the point of origin, car number and initials, contents, consignees and ultimate destination on the line of the State Belt Railroad (same as on the "Switch list"), and the through rate to such ultimate destination. The transportation charge for movement by the State Belt Railroad is absorbed by the carrier from whom the car is received. The carrier pays to the State Belt Railroad, a switching charge for moving [40] these cars. On outbound shipments, this "switch list" is made out by an agent of the carrier to whom the car is to be delivered by the State Belt Railroad, and shows the number and initials of the car, whether loaded or empty, and name of shipper. Concurrently with the making of such "switch list," the agent of the carrier to whom the car is to be delivered for further transportation (having received a shipping order from the consignor), makes out

and delivers to said carrier a waybill for the movement of the car to its final destination, showing thereon among other things heretofore mentioned, the consignor (same as on the "switch list") and point of origin as San Francisco, California, and ultimate destination of the car. It is then moved by a State Belt crew on the "switch list," delivered to the carrier road and the carrier transports the car to its destination. In some instances, where the State Belt Railroad shifts or switches a car between two points on its line without delivery to any other carrier, it collects such switching charge from the industry or individual requesting such movement.

VII.

In practically all instances, except intra line movements (last above referred to), the transportation of a car by the State Belt Railroad is made at the request of one of the other carriers. A large majority of the daily movements over the State Belt line for the year ending Dec. 30, 1925, were carload shipments of freight, (a) originating in states other than California and destined to consignees on the State Belt Railroad, or (b) originating on the State Belt Railroad and destined to the consignees in states other than California. Many of the cars so handled during this period both originated, and were destined and consigned to points in states other than California. A considerable portion of the traffic so handled [41] by the State Belt Railroad originated in, or was destined to, foreign countries.

VIII.

That the said State Belt Railroad is operated by the State of California for the purpose of facilitating the commerce of the Port of San Francisco without any profit being derived therefrom, and more often at a loss; that the charges made for the services rendered by said State Belt Railroad are made by defendants pursuant to the authority conferred upon them by Section 2524 of the Political Code of California, which authorized them to collect such an amount of revenue as will enable them to perform the duties required of them by authority of Article IX of said Political Code.

IX.

That all of the facts hereinabove stipulated (except as otherwise expressly stated) were true during, and have reference to, the year 1925, and during the times covered by the causes of action herein involved and hereinafter more specifically mentioned.

X.

The following facts relative to the specific causes of action set forth in said complaint are true, and the following testimony relative to said causes of action would be given by the inspectors of the Interstate Commerce Commission and the inspectors and employees of the State Belt Railroad if called as witnesses:

First Cause of Action: On October 15th, 1925, State Belt Railroad steam locomotive No. 7 switched freight-cars on the standard gauge tracks of the

State Belt Railroad in and about San Francisco, California, including box-cars C. M. & St. P. 592252 and 173547, loaded with furniture from Kiel, Wis., to the Gibralter Warehouse, San Francisco. [42]

That two (2) inspectors of the Interstate Commerce Commission would testify that on the said 15th day of October, 1925, just prior to the beginning of said switching, they measured the height of the drawbar on the rear end of the tender of said locomotive, measured perpendicularly from the level of the tops of the rails to the center line of said drawbar, and that said height of the drawbar on the rear end of the tender of said locomotive so measured was 30 inches; that said measurement was so made on Roundhouse Track No. 2.

That the inspector and employees of the State Belt Railroad would testify that they thereafter, and on the same day, and after said locomotive was moved to another track, measured the height of the drawbar at the rear end of the tender of said locomotive in the manner aforesaid and that said height so measured was 32–½ inches.

Second Cause of Action. The two (2) inspectors of the Interstate Commerce Commission would testify that on October 16, 1925, at 9:25 A. M. of said day, C. & N. W. box-car #118764 was hauled by the State Belt Railroad over its line from Track #2 at Pier 43 to Track #12 in the Powell Street yard, at which time it was in the condition alleged in the Government's complaint; that said car had been carded from Corwith, Ill., to San Francisco, California.

That the inspectors and employees of the State Belt Railroad would testify that said car was received from the Santa Fe Railway at 4:25 A. M. on the 16th day of October, 1925, with part of the uncoupling lever missing from the "A" end of said car; that said car was inspected on its arrival by inspectors of the State Belt Railroad, and again inspected at 9:00 A. M. of said day, and repaired by Santa Fe car inspector at 9:30 A. M. on said day.

Third Cause of Action. The two inspectors of the Interstate Commerce Commission would testify that at about 10:00 A. M. on October 16, 1925, S. P. Gondola freight-car #53261 was hauled by the [43] State Belt Railroad over its standard gauge line at San Francisco, California, from Track #1 to Track #3 and from Track #3 to Ferry Track #13 opposite Pier 43, at which time it was in the condition alleged in the Government's complaint.

The inspectors and employees of the State Belt Railroad would testify that said car was received from the Southern Pacific Company at 5:25 A. M. of said day; that the State Belt Railroad inspector was unable to make repairs.

Fourth Cause of Action. The two (2) inspectors of the Interstate Commerce Commission would testify that at 10:55 A. M. on October 16, 1925, W.P. box-car #15049 was hauled by the State Belt Railroad over its line in and about San Francisco from opposite Pier 43 to the track of the California Packing Corporation's Plant #1, at which time it was in the condition alleged in the Government's complaint.

The inspectors and employees of the State Belt Railroad would testify that the said car was received from the Western Pacific Railroad Company at about said time on October 16, 1925, in the said condition alleged in the Government's complaint.

Fifth Cause of Action. The two inspectors of the Interstate Commerce Commission would testify that at 8:20 A. M. on October 17, 1925, W. P. Box Car #30114 was discovered to be defective on W. P. Barge # 2 at the Ferry slip; that at 8:37 A. M. said car was hauled by the State Belt Railroad over its line in and about San Francisco from said W. P. Barge to the Chestnut Street yard of the Western Pacific R. R. Co., at which time it was in the condition alleged in the Government's complaint.

The inspectors and employees of the State Belt Railroad would testify that said car was received from the Western Pacific R. R. Co. at 8:00 A. M. on October 17, 1925, in the condition alleged [44] in the Government's complaint; that it was thereafter, and on said day, inspected and repaired by the inspector of the State Belt Railroad.

Sixth Cause of Action. The two inspectors of the Interstate Commerce Commission would testify that about 9:30 A. M. on October 19, 1925, S. F. I. & M. Flat Car #4020 was hauled by the State Belt Railroad over its line in and about San Francisco from opposite Pier #21 to the track of the Wire Works Lead Company, at which time it was in the condition alleged in the Government's complaint.

The inspectors and employees of the State Belt Railroad would testify that said car was received by the State Belt Railroad from the San Francisco Iron and Metal Company; that said company was the owner of said car and makes its own repairs.

Seventh Cause of Action. The two inspectors of the Interstate Commerce Commission would testify that at about 7:40 A. M. on October 22, 1925, U. C. R. Gondola Car #20031 was hauled by the State Belt Railroad over its line in and about San Francisco from W. P. Barge to Ferry Track #3, at which time it was in the condition alleged in the Government's complaint; that said car was, at said time, loaded with coal from Spring Canyon, Utah, to San Francisco; that said car was first discovered to be defective when received from W. P. Barge #2 at Pier 43.

The inspectors and employees of the State Belt Railroad would testify that said car was received from the W. P. Railroad at about 7:40 A. M. on said day in the condition alleged in the Government's complaint; that said car was inspected and repaired on said day by the inspector of the State Belt Railroad.

Eighth Cause of Action. That two inspectors of the Interstate [45] Commerce Commission would testify that on the morning of October 23, 1925, U. C. M. X. Flat Car #69087 was hauled by the State Belt Railroad over its line in and about San Francisco from the S. F. Iron & Metal Company's yard to Track #1 of the new yard of the Northwestern Pacific Company, at which time it was in

the condition alleged in the Government's complaint; that said car was again inspected on October 24, 1925, on the Simmon's Bedstead Manufacturing Company's track, and found to be in the same defective condition.

The inspectors and employees of the State Belt Railroad would testify that said car was received from the United Commercial Company on October 23, 1925, in a defective condition; that said car was handled carefully and returned to said company, who make their own repairs.

Ninth Cause of Action. That two inspectors of the Interstate Commerce Commission would testify that at about 9:00 A. M. on October 26, 1925, S. P. Box Car #84500 was hauled by the State Belt Railroad over its line in and about San Francisco, from opposite Pier 19 to the Sulphur track, at which time it was in the condition alleged in the Government's complaint; that said car was first discovered to be defective opposite Pier 19 as it was being received from the S. P. Company; that said car had been "Bad ordered" by the S. P. Company at 8:00 A. M. on October 26, 1925, for said defect.

XI.

That all the repairs made to the cars hereinabove mentioned by the State Belt Railroad inspectors were made shortly after the completion of the movements alleged by the Government.

XII.

It is further stipulated that the defendants herein

named, to wit, William A. Sherman, M. F. Cochrane and J. B. Sanford, are not now members of the Board of State Harbor Commissioners of the [46] State of California, and said defendants do not, at the present time, constitute the said Board of State Harbor Commissioners.

That subsequent to the times mentioned in the causes of action herein involved, and each and all of them, said defendants, and each and all of them, were succeeded in office by C. L. Tilden, Frank C. Sykes and Paul Schrarrenberg, and said C. L. Tilden, Frank C. Sykes and Paul Scharrenberg ever since their said appointments, have been, and now are, the duly qualified and acting Board of State Harbor Commissioners of the State of California.

VIII.

It is further stipulated that either plaintiff or defendants, or each of them, may adduce such further evidence, oral or documentary, and not inconsistent herewith, at the trial of the above-entitled action as they, or either of them, may desire.

GEORGE J. HATFIELD,
United States Attorney,
RICHARD M. LYMAN, Jr.,
Assistant United States Attorney,
M. C. LIST,
Special Assistant to the United States Attorney,
Attorneys for Plaintiff.
LEON E. MORRIS,
Attorney for Defendants. [47]

AND BE IT FURTHER REMEMBERED that thereafter, the said Court ordered that judgment be entered for plaintiff, to which ruling and order of the Court, the defendants then and there duly excepted, and hereby designate as

DEFENDANTS' EXCEPTION No. 1.

AND BE IT FURTHER REMEMBERED that thereafter and pursuant to said last mentioned order of said Court, to wit, on the 25th day of February, 1929, judgment was entered in favor of plaintiff and against defendants, to which judgment, defendants then and there duly excepted, and hereby designate as

DEFENDANTS' EXCEPTION No. 2.

Now within the time allowed by law and stipulation of counsel, defendants present the foregoing as their proposed bill of exceptions in the above-entitled action, and pray that the same may be settled and allowed.

Dated: May 10th, 1929.

LEON E. MORRIS,
Attorney for Defendants. [48]

STIPULATION FOR ALLOWANCE OF BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the foregoing bill of exceptions was presented by defendants within the time allowed by law therefor and that the same is a true and correct

copy of the proceedings had at the trial of the above-entitled action, and that the same may be certified, allowed and settled, as provided by law and the practice of said Court, by Honorable A. F. St. Sure, United States District Judge, who presided at the trial of said cause.

Dated: May 23d, 1929.

GEORGE J. HATFIELD,
United States Attorney,
By A. C. WOLLENBERG,
Assistant United States Attorney,
LEON E. MORRIS,
Attorney for Defendants.

ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS.

I, the undersigned, Judge of the District Court of the United States, do hereby certify that the foregoing bill of exceptions, having been presented within the time allowed by law therefor, is a true and correct copy of the proceedings had at the trial of said action, and do hereby settle and allow the same and order that said bill of exceptions be filed with the Clerk of this court.

Dated: May 23d, 1929.

A. F. ST. SURE,
United States District Judge.

Receipt of a copy of the within defendants' proposed bill of exceptions is hereby admitted this 11 day of May, 1929.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Plaintiff.

[Endorsed]: Filed May 11, 1929. [49]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The above-named defendants, William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad, considering themselves aggrieved by the judgment rendered and entered in the above-entitled action on February 25th, 1929, which said judgment is to the effect that plaintiff, United States of America do have and recover of and from William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad, defendants, the sum of nine hundred ($900.00) dollars, together with costs of suit, hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and said defendants pray that this, their appeal to the said United States Circuit Court of Appeals for the Ninth Circuit, may be allowed,

and that a transcript of the record, papers and proceedings upon which said judgment was made, duly authenticated, may be sent to said United States Circuit Court of Appeals for the Ninth Circuit.

Dated: San Francisco, California, May 23d, 1929.

LEON E. MORRIS,
Attorney for Defendants.

[Endorsed]: Filed May 23, 1929. [50]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Come now defendants above named, and file the following assignment of errors upon which they will rely upon the prosecution of their appeal in the above-entitled action from the judgment entered therein on the 25th day of February, 1929:

I.

That the United States District Court erred in overruling defendants' demurrer (entitled motion to dismiss) for the following reason:

(a) Plaintiff's complaint does not state facts sufficient to constitute a cause of action against defendants, either in their official capacity as members of the Board of State Harbor Commissioners of the State of California, or in their individual capacity.

(b) Plaintiff's complaint does not state facts sufficient to constitute a cause of action against de-

fendants in their individual capacity, in that it does not state any acts or negligence on the part of defendants individually, or any acts in violation of any statute imposing, or authorizing the imposition of any penalty upon any individual. [51]

(c) That the said District Court had no jurisdiction over defendants in their official capacity, as members of the Board of State Harbor Commissioners, operating the State Belt Railroad, in that said Commissioners in so operating said State Belt Railroad, were acting as a political arm or agency of the State of California, and were performing a Governmental function.

II.

That the evidence was and is insufficient to justify the decision and judgment of said District Court.

III.

That the evidence was and is insufficient to justify the decision and judgment of said District Court in the following particulars:

(a) That there is no evidence that defendants had any personal connection whatsoever with any violations of law.

(b) That there is no evidence of any individual tort committed by defendants or any of them.

(c) That there is no evidence that defendants individually are a common carrier.

IV.

That the said judgment of the District Court is

contrary to the evidence in that it appears from said evidence that any violations of the Federal Safety Appliance Act alleged, occurred without the personal knowledge of defendants or any of them, and without the consent of defendants or any of them and contrary to the orders and instructions of defendants.

V.

That the said District Court erred in rendering and entering judgment against defendants in the following particulars:

1. Said judgment against defendants in their official capacity, as members of the Board of State Harbor Commissioners of the State [52] of California, operating the State Belt Railroad is erroneous in that

(a) Said District Court has no jurisdiction over an action against the State of California, such jurisdiction being original in the Supreme Court of the United States under the Constitution of the United States.

(b) The United States of America has no authority to impose a fine or penalty upon the State of California.

2. Said judgment against defendants, individually, is erroneous in that

(a) Said defendants individually are not a common carrier and the Federal Safety Appliance Act imposes a penalty upon the common carrier only, and not upon its officers or agents.

(b) The acts complained of arose in the oper-

ation of the State Belt Railroad in the course of defendants' official duties and were acts with which they had no personal connection whatsoever, and defendants are not individually and personally liable for torts of their subordinate officers, employees or agents.

VI.

That said District Court erred in adjudging that the Federal Safety Appliance Act imposes or authorizes the imposition of a penalty upon any persons individually.

VII.

That said District Court erred in adjudging that these defendants, as members of the Board of State Harbor Commissioners, were liable for acts in the nature of torts committed by subordinate officers, with which said defendants had no personal connection whatsoever.

VIII.

That said District Court erred in adjudging that it had jurisdiction over an action against officers of the State of California acting in their official capacity, in operating the State Belt [53] Railroad, such jurisdiction being original in the Supreme Court of the United States.

IX.

That said judgment of said District Court is erroneous in that it imposes a fine or penalty upon officers of the State of California for acts occurring in the regular performance by them of a Governmental function of the State of California.

X.

That said District Court erred in rendering and entering judgment for plaintiff in said action in that said judgment is contrary to law and the facts.

WHEREFORE, said defendants pray that the judgment of the District Court of the United States for the Northern District of California, Southern Division hereinabove referred to, be reversed, and for such other and further relief as may be proper in the premises.

LEON E. MORRIS,
Attorney for Defendants.

[Endorsed]: Filed May 23, 1929. [54]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND.

On motion of Leon E. Morris, attorney for defendants above named, IT IS ORDERED that the appeal of said defendants to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered and entered in the above-entitled action on February 25th, 1929, be, and the same is hereby allowed and that a duly authenticated transcript of the record, papers and proceedings on which said judgment was made be sent to said United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that said defendants file with the Clerk of this court a good and sufficient bond in the sum of $1,250.00 conditioned as required by law, to cover prosecution of this appeal and damages, judgment and costs, and that said bond on appeal shall operate as and constitute supersedeas bond.

Dated: May 23d, 1929.

A. F. ST. SURE,
United States District Judge.

Approved:

FRANK S. DIETRICH,
Circuit Judge.

May 24th, 1929.

[Endorsed]: Filed May 32, 1929. [55]

(Title of Court and Cause.)

UNDERTAKING ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That Hartford Accident and Indemnity Company, of Hartford, Connecticut, a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and duly licensed to transact business in the State of California, is firmly bound unto United States of America, plaintiff in the above-entitled cause, in the sum of twelve hundred fifty and no/100 ($1250.00) dollars, to be paid unto the said United States of America, for

which payment well and truly to be made, the Hartford Accident and Indemnity Company binds itself, its successors and assigns, firmly by these presents.

Signed, sealed and dated this 24th day of May, 1929.

The condition of the above obligation is such that whereas the said William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California operating the State Belt Railroad, defendants in the above-entitled cause, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment of the above-entitled court entered in said cause on the 25th day of February, 1929.

Now, therefore, the condition of the above obligation is that if the said William A. Sherman, M. F. Cochrane, and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California operating the State Belt Railroad, shall prosecute their said appeal to effect and answer all damages and costs which may be adjudged [56] if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

It is further stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the above-named District Court may, upon notice to the surety above-named, proceed summarily in said proceedings to ascertain the amount

which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor.

HARTFORD ACCIDENT AND INDEMNITY COMPANY.

[Seal]

By RUSSELL McNUTT,
Attorney-in-fact.

This bond approved as to form, amount and sufficiency of surety.

May 24/29.

FRANK S. DIETRICH,
Judge of the U. S. Circuit Court.

[Endorsed]: Filed May 24, 1929. [57]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare record on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled matter, and include therein the following papers and documents:

Complaint.

Demurrer to complaint (entitled motion to dismiss).

Minute order overruling demurrer.

Answer.

Stipulation of facts and waiver of jury.

Judgment.

Bill of exceptions.
Petition for appeal.
Assignment of errors.
Order allowing appeal and fixing amount of bond.
Bond on appeal.
Citation on appeal with admission of service.
This praecipe.

LEON E. MORRIS,
Attorney for Defendants.

Receipt of a copy of the within praecipe is hereby admitted this 24 day of May, 1929.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed May 24, 1929. [58]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 58 pages, numbered from 1 to 58, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $28.00; that the said amount

was paid by the appellant and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 4th day of June, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [59]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.
The President of the United States, to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad, are appellants and you are appellee, to show cause, if any there be, why the judgment rendered and entered against said appellants as in the said order allowing appeal

mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge for the Northern District of California, Southern Division, this 23d day of May, 1929.

A. F. ST. SURE,
United States District Judge. [60]

Service and receipt of a copy of the within citation on appeal is hereby admitted this 24 day of May, 1929.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Citation on Appeal. Filed May 24, 1929.

[Endorsed]: No. 5839. United States Circuit Court of Appeals for the Ninth Circuit. William A. Sherman, M. F. Cochrane and J. B. Sanford, Constituting the Board of State Harbor Commissioners of the State of California, Operating the State Belt Railroad, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 4, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5839.

WILLIAM A. SHERMAN, M. F. COCHRANE and J. B. SANFORD, Constituting THE BOARD OF STATE HARBOR COMMISSIONERS of THE STATE OF CALIFORNIA, Operating THE STATE BELT RAILROAD,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

STIPULATION RE PRINTING OF RECORD.

WHEREAS, the stipulation entitled "Waiver of jury and stipulation of facts" appears twice in full in the record herein, to wit, once as such stipulation commencing on the top of page 18 and ending at the bottom of page 31 of said record, and a second time as a part of the bill of exceptions commencing on line 13, page 34 and ending on line 29, page 47 of said record,—

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the respective parties hereto pursuant to the provisions of Rule 23 of the said United States Circuit Court of Appeals, that the said stipulation constituting pages 18 to 31 inclusive of said record need not be printed and that said stipula-

tion constituting a part of the said bill of exceptions, to wit, from line 13 of page 34 to line 29 of page 47 inclusive of said record, shall be printed and shall constitute the said stipulation entitled "Waiver of jury and stipulation of facts" for all purposes of this appeal.

Dated: July 15th, 1929.

LEON E. MORRIS,
Attorney for Appellants.
GEO. J. HATFIELD,
United States Attorney.
By ALBERT C. WOLLENBERG,
Assistant United States Attorney,
Attorneys for Appellee.

[Endorsed]: Stipulation Relating to Printing of Record. Filed Jul. 15, 1929. Paul P. O'Brien, Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 5839

WILLIAM A. SHERMAN et al., Appellants,

vs.

UNITED STATES OF AMERICA, Appellee

No. 5904

WILLIAM A. SHERMAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Oct. 30, 1929

Ordered appeal in each of above causes argued by Mr. Edward M. Jaffa, counsel for the appellants in each of above causes, and by Mr. Lucas E. Kilkenny, Assistant United States Attorney, counsel for the appellee, and submitted to the court for consideration and decision.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 5839

WILLIAM A. SHERMAN et al., etc., Appellants,

vs.

UNITED STATES OF AMERICA, Appellee

ORDER DIRECTING FILING OF CERTIFICATE CERTIFYING CERTAIN QUESTIONS OR PROPOSITIONS OF LAW TO THE SUPREME COURT OF THE UNITED STATES—Nov. 12, 1929

By direction of the Court, Ordered certificate certifying certain questions or propositions of law to the Supreme Court of the United States under Section 239 of the Judicial Code be filed, and that a certified copy of said certifi-

cate be forthwith forwarded by the Clerk of this Court to the Clerk of the Supreme Court of the United States.

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit certifying questions of law to the Supreme Court of the United States Under Section 239, omitted in printing here as it appears under separate cover.

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION TO BRING UP ENTIRE RECORD AND CAUSE—May 5, 1930

On consideration of the motion for a writ of certiorari to bring up the entire record and cause,

It is now here ordered by this Court that the said motion be, and the same is hereby, granted.

FILE COPY

APR 25 1930

No. ~~136~~ 14

In the Supreme Court of the United States

OCTOBER TERM, 1929

WILLIAM A. SHERMAN, M. F. COCHRANE, AND J. B. SANFORD, CONSTITUTING THE BOARD OF STATE HARBOR COMMISSIONERS OF THE STATE OF CALIFORNIA, OPERATING THE STATE BELT RAILROAD, APPELLANTS (BELOW)

v.

THE UNITED STATES OF AMERICA, APPELLEE (BELOW)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT MOTION TO BRING UP THE ENTIRE RECORD AND CAUSE

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 486

WILLIAM A. SHERMAN, M. F. COCHRANE, AND J. B. Sanford, Constituting the Board of State Harbor Commissioners of the State of California, Operating the State Belt Railroad, appellants (below),

v.

THE UNITED STATES OF AMERICA, APPELLEE (BELOW)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT MOTION TO BRING UP THE ENTIRE RECORD AND CAUSE

Now come William A. Sherman, M. F. Cochrane, and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad, Appellants, and The United States of America, Appellee, in this cause in the United States Circuit Court of Appeals for the Ninth Circuit, now pending in this Court on questions certified by the said Circuit Court of Appeals, and move that this Honorable Court issue its writ of certiorari commanding that

Court to certify and send to this Court the entire record in this cause, in order that this Court may consider and decide the whole matter in controversy as upon appeal, pursuant to Section 239 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (U. S. Code, Tit. 28, Sec. 346) and Rule 37 of the Rules of the Supreme Court of the United States.

A certified transcript of the record in this case and nine printed copies thereof have been lodged with the Clerk of this Court as exhibits to this motion.

It is believed that a final determination of the whole matter in controversy can be made by this Court when it has the entire record before it, and such a determination in this Court is highly desirable.

This is a suit commenced in the United States District Court for the Northern District of California (S. D.) by the United States against William A. Sherman, M. F. Cochrane, and J. B. Sanford, who constituted the Board of State Harbor Commissioners of the State of California and operated the State Belt Railroad, to recover statutory penalties for nine separate violations of the Federal Safety Appliance Act and Acts amendatory thereof (27 Stat. 531, 29 Stat. 85, 32 Stat. 943, 36 Stat. 298). This railroad, which extends a distance of about five miles along the water front of San Francisco Bay, is owned and operated by the State

of California. On an agreed statement of facts, which is in the record (p. 24–40), judgment was entered on February 25, 1929, in favor of the United States for the full amount for which suit was brought. An appeal was duly taken by the defendants to the United States Circuit Court of Appeals for the Ninth Circuit, which court by certificate filed November 12, 1929, has certified to this Court the following questions:

> 1. Is the State Belt Railroad a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act?
>
> 2. If No. 1 is answered affirmatively, is the State Belt Railroad (owned and operated by the State of California) subject to the Safety Appliance Act, which by general language imposes duties upon "any common carrier engaged in interstate commerce" but does not expressly refer to a State or other sovereignty? (*Guarantee Company* v. *Title Guaranty Company,* 224 U. S. 152, 155, et seq.)
>
> 3. If this question also is answered in the affirmative, and if the complaint and the judgment be construed as running against the members of the Board of State Harbor Commissioners, in their official capacity, and hence in a sense against the State, did the District Court have jurisdiction of the action?
>
> 4. Upon the other hand, if the judgment be deemed to be against the defendants in

their private capacity can it be sustained in view of the considerations:

(a) That the Act imposes penalties only upon the "carrier"; and

(b) That the defendants did not own or personally manage or operate the Belt Line, and the alleged infractions of the law were due to no act or omission upon their part and the wrong-doing was not only without their participation, consent, and knowledge but was contrary to their orders and instructions?

Important constitutional questions touching the relation of the State and the Federal Governments are involved in this case, and it is believed that the entire record, although brief, will offer the Court assistance in its decision which is not available in the certificate alone. Counsel state that in their opinion they will be able to present the case more satisfactorily upon the record than upon the certificate. While it is true that the questions certified cover all the decisive issues in the case, it is believed in the interest of the two governments affected that any possibility of further litigation in this case should be avoided by a final determination in this Court of the whole controversy.

Wherefore, the parties hereto jointly pray that this Honorable Court issue its writ of certiorari commanding the United States Circuit Court of Appeals for the Ninth Circuit to certify and send to this Court the entire record in this cause,

in order that this Court may consider and decide the whole matter in controversy as upon appeal.

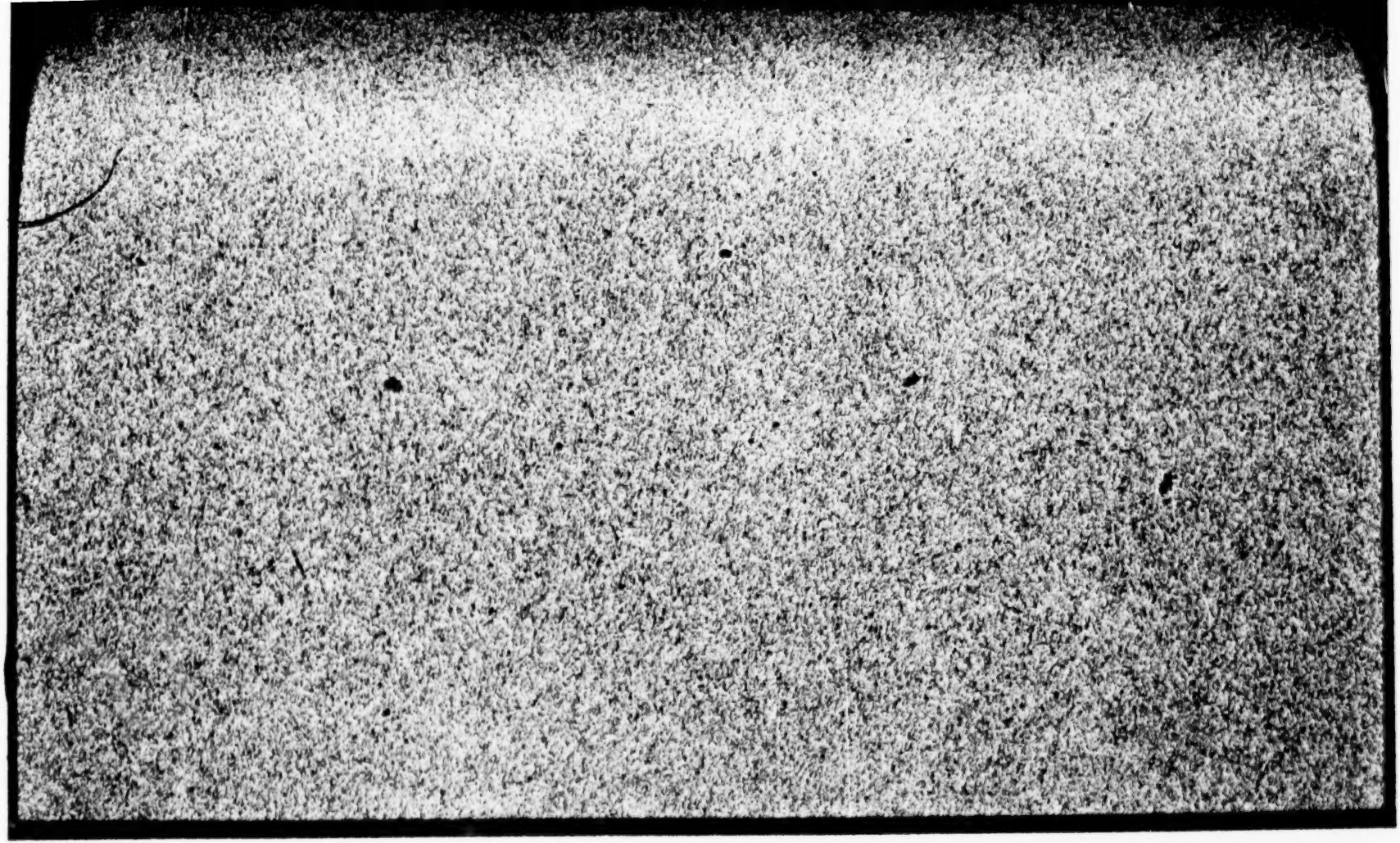
William A. Sherman, M. F. Cochrane, and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad.

LEON E. MORRIS,
By HIRAM W. JOHNSON,
Attorneys.

THE UNITED STATES OF AMERICA,
By THOMAS D. THACHER,
Solicitor General.

APRIL 24, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930



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MAR 31 1930
CHARLES ELMORE CROPLEY
CLERK

(34,617)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. ~~435~~ 14

WILLIAM A. SHERMAN, M. F. COCHRANE, and J. B. SANFORD, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

LEON E. MORRIS,
Crocker First National Bank Building, San Francisco,
Counsel for Appellants.

EDWARD M. JAFFA,
Crocker First National Bank Building, San Francisco,
Of Counsel.

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(34,617)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 486

WILLIAM A. SHERMAN, M. F. COCHRANE, and J. B. SANFORD, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

I.

OPINION OF THE COURT BELOW.

This case is before this Court on certified questions of law from the United States Circuit Court of Ap-

peals for the Ninth Circuit, and, therefore, no opinion by the Court below has been rendered or is involved.

II.

JURISDICTION.

Said questions were certified by said United States Circuit Court of Appeals, pursuant to Judicial Code Section 239, as amended in 1925. Act of Cong., February 15, 1925, C. 229, § 1, 43 Stat. 938.

III.

STATEMENT OF CASE.

This action was brought by the United States against William A. Sherman, M. F. Cochrane, and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad, defendants, to recover statutory penalties for nine alleged violations of the Federal Safety Appliance Act and amendments thereto.

A jury was waived and the cause submitted upon a written stipulation of facts and judgment entered by the Trial Court for nine hundred ($900.00) dollars against defendants as above named and designated. From this judgment the defendants appealed to the United States Circuit Court of Appeals for the Ninth Circuit. (R. 1.)(Tr. 22, 43)

In the certificate of the United States Circuit Court of Appeals, the appellants are referred to as defend-

ants and for convenience, they will be hereinafter so referred to.

The acts complained of consisted of hauling cars with defective coupling devices and drawbars, and occurred upon and in the course of the operation of what is known as the State Belt Railroad. The said railroad is owned and operated by the State of California and located wholly within the City of San Francisco. (R. 1, 2.) (Tr. 25) The said railroad is operated by the State for the purpose of facilitating the commerce of the Port of San Francisco without any profit being derived therefrom. The charges made for the services rendered by the railroad are made pursuant to the authority conferred by Section 2524 of the Political Code of California, which authorizes collection of such an amount of revenue as will enable the State officers to perform their duties as required of them by authority of Article IX of the Political Code. (R. 4.) (Tr. 25-26; 34)

The character of the State Belt Railroad and the nature of the services performed by it are specifically covered in the statement of facts in the certificate of the United States Circuit Court of Appeals. (R. 2, 3, 4.) (Tr. 26-33)

Briefly stated, this railroad, operated by the State of California, furnishes switching services to and from wharves, car ferries, railroad yards and the industries located along and adjacent to the waterfront of the City of San Francisco. The only equipment of said railroad consists of locomotives, a roundhouse

and tracks along the waterfront. It neither owns nor operates any cars. It renders switching services only.

The defendants are appointive State officers and constitute what is designated under the State statutes, as the Board of State Harbor Commissioners. They do not personally operate or supervise the operation of the State Belt Railroad. It is operated under the immediate and personal supervision of a superintendent appointed by and holding office at the pleasure of said Board. All persons having anything to do with the maintenance and operation of said railroad are employees and servants of the State. Due diligence was used by the defendant Harbor Commissioners in the selection of employees including (at the times mentioned in the complaint) five inspectors whose duty it was to make inspections of all appliances covered by the Federal Safety Appliance Act and orders of the Interstate Commerce Commission issued pursuant thereto. (R. 4.)(Tr. 25-27)

The defendants did not personally operate or supervise the operation of the State Belt Railroad. They did not personally participate in and had no personal knowledge whatsoever of the commission of any of the alleged violations of the Federal Safety Appliance Act complained of, and if such violations or any of them occurred, it was without their knowledge, without their consent and contrary to their orders and instructions. (R. 4.) (Tr. 28)

This action is in the nature of a *test case*. It was submitted to the District Court upon an agreed stipulation of facts for the purpose of squarely presenting

the essential and vital points involved in the question of what liability *if any* rests upon the Board of State Harbor Commissioners, either in their official capacity as officers of the State (i. e., liability of the State of California) or in their private capacity as individuals for violations of the Federal Safety Appliance Act *occurring without their personal participation, without their knowledge or consent and contrary to their orders and instructions.*

The defendants urge that they are *not* liable in *either* capacity for any such violations. Their contentions are summarized in detail at the opening of the argument *infra.*

IV.

QUESTIONS OF LAW.

The following questions of law are certified to this Honorable Court by the said United States Circuit Court of Appeals:

1. Is the State Belt Railroad a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act?

2. If No. 1 is answered affirmatively, is the State Belt Railroad (owned and operated by the State of California) subject to the Safety Appliance Act, which by general language imposes duties upon "any common carrier engaged in interstate commerce" but does not expressly refer to a State or other sovereignty? (*Guarantee Company v. Title Guaranty Company,* 224 U. S. 152, 155, et seq.)

3. If this question also is answered in the affirmative, and if the complaint and the judgment be construed as running against the members of the Board of State Harbor Commissioners, in their official capacity, and hence in a sense against the State, did the District Court have jurisdiction of the action?

4. Upon the other hand, if the judgment be deemed to be against the defendants in their private capacity, can it be sustained in view of the considerations:

(a) That the Act imposes penalties only upon the "carrier": and

(b) That the defendants did not own or personally manage or operate the Belt Line, and the alleged infractions of the law were due to no act or omission upon their part and the wrongdoing was not only without their participation, consent, and knowledge, but was contrary to their orders and instructions?

V.

ARGUMENT.

The argument will follow the order of the above questions.

Summary of Argument.

Point A. That the State Belt Railroad (owned and operated by the State of California) is not a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act.

Point B. That the State Belt Railroad (owned and operated by the State of California) is not subject to

the Federal Safety Appliance Act. The Federal Safety Appliance Act does not expressly refer to a State or other sovereignty and therefore, does not apply thereto. It could not properly so apply because the United States has no right to impose a fine or penalty upon the State of California or upon the officers of the State of California, for acts occurring in the regular performance by them of a Governmental function of said State.

Point C. That if the complaint and judgment be construed as running against the members of the Board of State Harbor Commissioners in their official capacity and hence against the State, then the District Court of the United States did not have jurisdiction of the action.

Point D. That if the judgment be deemed against defendants in their private capacity, then it cannot be sustained, because

(a) The Act imposes a penalty upon the "carrier" only and *not* upon any individual or officer thereof;

(b) Defendants did not own or personally manage or operate the Belt Line; the alleged infractions of law were due to no act or omission upon their part and the wrong-doing was not only without their participation, consent and knowledge but also contrary to their orders and instructions. The defendants cannot be held liable in their private capacity for such infractions of law. The defendants are not personally liable for the torts of their subordinate officers.

POINT "A."

THE STATE BELT RAILROAD (OWNED AND OPERATED BY THE STATE OF CALIFORNIA) IS NOT A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE.

The determination of the character of the State Belt Railroad is one of vital interest to the State of California and to all other states having harbors or ports.

The real question to be determined here is basic and resolves itself into this:

Can a sovereign state, in the performance of its governmental functions in maintaining a harbor, render switching service over its own lines between its own docks and the nearby industries and yards of interstate commerce carriers without itself becoming a common carrier engaged in interstate commerce?

We urge that the answer to this question must be in the affirmative.

If it be possible for a state to so act, and we contend it is, then the State of California, through the State Belt Railroad is merely rendering such service, and is not a common carrier engaged in interstate commerce.

From the certificate of the Circuit Court it appears that the State of California, in connection with the operation and maintenance of said State Belt Railroad, has no property whatsoever other than locomotives and tracks located upon property belonging to the State of California; that it is not a party to any through rate agreement; has no dealings whatever with shippers; that it issues no bills of lading nor does it move any cars on waybills, and that it charges

a flat rate per car for switching, the rate being a little higher for a loaded car than an empty one.

The State of California, through the State Belt Railroad, is thus shown to perform only a switching service pure and simple, and to do nothing else. If it be determined to be a common carrier engaged in interstate commerce, then it is impossible for a sovereign state, in connection with its operation of a port, to render switching service without assuming the liabilities of a common carrier and subjecting itself to all of the rules and regulations of the Interstate Commerce Commission, and similar statutes. The question, as above submitted, is therefore squarely presented in the case at bar.

We believe that this is a case of first impression in this Court and, with the exception of one case to be hereinafter mentioned, of first impression in the country, in that it involves switching services rendered by a *sovereign State over its own property* as an incident to the operation and maintenance of *its harbor*, to-wit, the Port of San Francisco.

This is a *controlling fact.*

The Federal Safety Appliance Act relates only to common carriers *engaged* in interstate commerce. Section 1 provides:

> "That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any *common carrier engaged in interstate commerce* by railroad to use on its line * * *." (Italics ours.)
>
> Act of Cong., March 2, 1893, c. 196. (27 Stat. 531.)

The subsequent sections of this Act material to this case refer to "such common carrier."

The element of *engaging* in interstate commerce is thus material. The *mere fact* that freight in the course of an interstate shipment is *upon the tracks* of the State Belt Railroad is *not* controlling.

The State of California does *not engage* in interstate, or any, commerce. It is *not* engaged in the *business* of a common carrier or any other business. It *is* engaged in the *governmental function* of maintaining a harbor.

The maintenance of the Harbor of San Francisco has been held to be a governmental function by the Supreme Court of the State of California.

Denning v. State, 123 Cal. 316.

Said case involved an action for tort by a deckhand employed upon a fire tugboat belonging to the State and used by the Board of State Harbor Commissioners. The Court held that the State was not liable for such tort and in the course of its opinion, the Court stated (123 Cal. 320):

> "Article 15 of the constitution contains the following provisions:
>
> 'Section 1. The right of eminent domain is hereby declared to exist in the state to all frontages on the navigable waters of the state.
>
> 'Section 2. No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of

such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always attainable for the people thereof.

'Section 3. All tide lands within two miles of any incorporated city or town in this state and fronting on the waters of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations.'

These provisions of the constitution clearly show that the state has retained the control of the harbors and frontages thereon for the use and benefit of the people, for the promotion of commerce and the general benefit of the body politic, and not as a mere business enterprise through which profits may accrue to the state treasury: *and the statute creating the state board of harbor commissioners is intended and adapted to the execution of this purpose.* It gives, it is true, various powers to that board, and imposes upon it various duties, some of them of a character which, under certain circumstances, may give a cause of action against the state. The construction of seawalls, wharves, piers, boats, et cetera, require contracts for material and labor, and the state is liable upon its contracts. And so the board is authorized to conduct the business of a wharfinger, collecting tolls and charges for loading and unloading freight upon its wharves, storage thereon, et cetera, a business that might be conducted by an individual or private corporation, but all such business necessarily involves matters of contract upon which the state may become liable. But the powers and duties of the board are diversified. It has control of the bay and of the vessels using it; keeping open passageways for the ferryboats; controlling the anchorage of vessels; removing vessels from the wharves and piers when unloaded, and the general care of all the property belonging to the estate and

connected with the wharves and piers, or used by said board. *These duties are of a police character and purely governmental.* * * *"

"So here, the fact that the board is authorized and required to collect tolls and charges under the act does not make the board an instrument or agency of the state for profit, or convert it into a mere business enterprise. *The act creating the board and defining its powers and duties was inspired and authorized by the constitution itself in the interest and for the benefit of the people through the promotion of commerce, which is always one of the chief cares and imperative duties of all governments.*" (Italics ours.)

The language of the Court above quoted relative to certain duties which might perchance give a right of action against the State refers to actions upon *contract* only, and *not* upon tort.

Where a State engages in an activity ordinarily private in its nature, the said activity thereby becomes impressed with the sovereign character of the State.

"* * * The State is inherently sovereign at all times and in *every capacity.* * * * It can do no act except in the exercise of this sovereign power and within these constitutional limitations. If it may constitutionally take over any enterprise, though usually of the nature of a private business, the very taking over is an exercise of this sovereign power." (Italics ours.)

Riddoch v. State of Washington, 68 Wash. 329, 335; 123 Pac. 450;

Rauschan v. State Comp. Ins. Fund, 80 Cal. App. 754, 766.

Therefore, regardless of the character of the State Belt Railroad if privately operated, it cannot be held

to be engaged in interstate commerce when operated by the State of California.

The one exception, above mentioned to this being a case of first impression, is *McCallum v. United States,* 298 Fed. 373.

Defendants contended below and now contend that this earlier decision relating to the State Belt Railroad is erroneous and should be overruled. It is fully discussed under point "D" *infra.*

The cases discussing the general character of switching service and terminal facilities though not controlling are illuminating.

One leading case passing upon the particular character of switching service is *Kentucky and Ind. Bridge Co. v. Louisville & Nashville R. R. Co.,* 37 Fed. 567.

This case, in so far as applicable to the case at bar, involved the switching of freight over a bridge, the traffic being clearly interstate in character. The Court, in the course of a very long opinion, held (37 Fed. 615):

> "That petitioner is not, in law or in fact, a common carrier of property or freights within the true meaning of Section 1 of the act to regulate commerce, and that in respect to freight which it offers or seeks to have interchanged with respondent at said Seventh and Magnolia connection, it is only a transfer company or agency engaged in performing a switching service for which it demands and receives from the party for whom such service is rendered, not traffic rates on the freight transported or transferred, but simply a switching charge for the shifting of cars, loaded or empty, from one line of connection to another."

The foregoing decision is squarely in point upon the general facts here involved; the service rendered being of the same character in said case as that rendered by the State Belt Railroad, viz.: the simple switching of cars at a per car charge.

Cases holding terminal railroads to be common carriers engaged in interstate commerce when they furnish terminal facilities for railroads engaged in such commerce are not in point in that they show that said terminal railroads furnish facilities or perform acts of one sort or another which placed them in the category of common carriers—acts and services not done or rendered by the State of California in the operation of the State Belt Railroad. Typical of this class of cases is

United States v. Brooklyn Eastern District Terminal, 249 U. S. 296; 63 L. Ed. 613.

Mr. Justice Brandeis, in rendering the opinion of the Court in said case, stated, in discussing the character of a terminal railroad (249 U. S. 306):

> "What the Terminal contracts to transport, however, is not primarily cars, but their contents. Its compensation is measured not by the weight, size, or character of the car, but by the weight and the origin or destination of the goods carried therein. These goods the Terminal must, under its contracts with the railroad companies, receive and carry at the rates specified for all who offer them, as fully as the railroad companies do at their other stations. The incidental services performed by the Terminal in respect to these goods are also the same as those performed by the railroad companies at their other stations. For all freight originating at Brooklyn, it issues through bills of lading to destination. Upon prepaid ship-

ments originating there, it collects from the shippers the charges for transportation from Brooklyn to final destination, except where shippers are on the credit lists of the railroad companies. Upon goods arriving over its line at Brooklyn, it collects from the consignees the charges from point of origin, unless these were prepaid. As the Terminal receives both from railroad companies and from shippers also less-than-carload freight, it doubtless performs the loading and unloading, as is done at other railroad stations; and for freight delivered at Brooklyn takes appropriate receipts. In no respect, therefore, does the service actually performed by the Terminal for or in respect to shippers differ from that performed by the railroad companies at their other stations."

Another such case is *United States v. Union Stockyards Co.*, 226 U. S. 286; 57 L. Ed. 226.

Said case involved three corporations, lease and profit sharing arrangements between them and the rendering of ordinary railroad service such as loading and unloading and accepting less-than-carload shipments. The real basis of the Court's decision, as indicated in the opinion of Mr. Justice Day was (226 U. S. 306):

> "We think that these companies, because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the Act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that Act."

Such examples may be multiplied indefinitely. An examination of the facts involved in all cases holding

belt and terminal railroads to be common carriers engaged in interstate commerce will show that such roads perform some regular railroad service—some service directly connected with the handling of the property transported, the issuing of bills of lading and waybills, direct dealings with the shippers or collection of the transportation charges from the shippers as agent for the interstate carrier.

Underlying all of these cases is the basic principle that the belt or terminal railroad involved is engaged in the *business* of a common carrier and in the *business* of handling interstate commerce.

The State of California, in the operation of the State Belt Railroad, does *not* perform any of the above mentioned railroad services. It is *not engaged* in the *business* of a common carrier or in the *business* of interstate commerce.

A sovereign State, as above noted, in operating a belt railroad in connection with the operation and maintenance of its harbors, stands in a unique position, and regardless of what the decision would be were the State Belt Railroad privately operated, the State of California, in operating it, cannot be held to be engaging in interstate commerce.

The conclusion is compelled, therefore, upon both of the foregoing grounds, that the State Belt Railroad (owned and operated by the State of California) is *not* engaged in interstate commerce within the meaning of the Federal Safety Appliance Act. It is, therefore, respectfully submitted that the answer of this Honorable Court to the first question certified by the

United States Circuit Court of Appeals, should be "No."

POINT "B."

THE STATE BELT RAILROAD (OWNED AND OPERATED BY THE STATE OF CALIFORNIA) IS NOT SUBJECT TO THE FEDERAL SAFETY APPLIANCE ACT.

1. The Federal Safety Appliance Act Does Not Expressly Refer to a State or Other Sovereignty and Therefore Does Not Apply Thereto.

The material part of Section 1 of said Act reads as follows:

> "That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any *common carrier engaged in interstate commerce* by railroad to use on its line any * * * ." (Italics ours.)
>
> Act of Cong. March 2, 1893, C. 196, 27 Stat. 531.

Five of the alleged violations involved were of Section 2 of said Federal Safety Appliance Act. (Act of Cong. March 2, 1893, C. 196, 27 Stat. 531, as amended by Section 1 of Act of Cong. March 2, 1903, C. 976, 32 Stat. 943.)

The material part of said Section 2 is as follows:

> "That on and after the first day of January, 1898, it shall be *unlawful* for any such *common carrier* to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." (Italics ours.)

The penalty sought to be enforced, is authorized by Section 6 of said Act (Act of Cong., March 2, 1893, C. 196, 27 Stat. 532, as amended by Act of Cong. April 1, 1896, C. 87, 29 Stat. 85.) The material part of this section reads as follows:

> "That any such *common carrier* using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line, any car in violation of any of the provisions of this Act, shall be *liable to a penalty* of $100.00 for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed. * * *" (Italics ours.)

The other four violations involved were of Sections 2 and 3 of the Amendment of 1910 to the Federal Safety Appliance Act (Act of Cong., April 14, 1910, C. 160, 36 Stat. 298) and the regulations of the Interstate Commerce Commission made pursuant thereto. These sections and regulations provided for certain additional safety devices and for a minimum height of drawbars. Section 4 of said Act of 1910 (36 Stat. 299) provides for a penalty similar to that provided for in Section 6 of the original act (*supra*), and the material part thereof reads as follows:

> "That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six."

It is apparent from these statutes that the action is one involving an *unlawful act* and a penalty therefor, and that the penalty is authorized to be collected from the *common carrier* permitting the unlawful act, in this case, hauling or permitting to be hauled the cars defectively or improperly equipped.

The statutes in question do not in terms apply, nor do they purport to apply to a sovereign State.

A sovereign authority is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights and interests of the sovereign.

Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152; 56 L. Ed. 706.

This case involved the construction of various bankruptcy acts and while the decision of the lower Court on the facts was reversed, this Honorable Court apparently affirmed the general principle involved. In the course of its opinion the Court stated that the proposition is established, and quoted, we believe with approval, the following language from the opinion of the United States Circuit Court of Appeals:

> "The decision was expressly put upon the ground 'that the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign.' There was much reasoning to sustain the proposition, and it was especially applied to discharges in bankruptcy. Expressing the general assent to the proposition announced, the court said:
>
> 'Greater unanimity of decision in the courts or of views among text writers can hardly be found

upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts, Federal or state, nor among the text writers of this court.'"

(224 U. S. 155, 156.)

U. S. v. Herron, 20 Wall. (U. S.) 251; 22 L. Ed. 275.

In said case the Court held that debts due to the United States were not within the provisions of the Bankruptcy Act then in force and were not barred by a discharge under said Act.

In the course of its opinion, the Court stated (20 Wall. 255):

"Instead of that, the question presented by the assignment of error in this court must depend upon other provisions of the Bankrupt Act, when properly construed, in view of the *settled rule of construction that the sovereign authority of the country is not bound by the words of a statute unless named therein* if the statute tends to restrain or diminish the powers, rights or interests of the sovereign. *Anonymous,* 1 Atk., 262; *Rex v. Earl,* Bunb., 33; *Rex v. Pixley,* Bunb., 202." (Italics ours.)

In Re Fourble, 213 Fed. 677.

In said case, the United States District Court of Maryland, in holding lands and buildings of the State of Maryland to be not subject to mechanics' liens, stated (p. 679):

"The Maryland code, it is true, provides that 'every building * * * shall be subject to a lien' and provides that mechanic's lien laws shall be construed as remedial statutes. Code 1912, Art. 63, Secs. 1 and 41. In none of these statutory provisions is special mention made of the state.

Upon the general rule applicable to all sovereigns, they are not binding upon it. *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706."

Sullivan v. School Dist. No. 1, City of Tomah, 179 Wis. 502; 191 N. W. 1020.

Said case involved the question of liability of defendant for an injury arising from an alleged failure to perform a statutory duty to equip saws with safety devices.

The Court held that a demurrer to the complaint had been properly sustained both upon the general ground of non-liability of the School District and upon principles of statutory construction, and in the course of its opinion, stated (179 Wis. 507):

"In connection with what has been said, there is also the general rule, adopted both by this Court and the Supreme Court of the United States, that *general statutes are not to be construed to include, to its hurt, the sovereign. Sandberg v. State,* 113 Wis. 578, 579, 89 N. W. 504; *Dollar S. Bank v. United States,* 19 Wall. 227, 22 L. Ed. 80; *United States v. Verdier,* 164 U. S. 213, 219, 17 Sup. Ct. 42, 41 L. Ed. 407.

In *Milwaukee v. McGregor,* 140 Wis. 35, 121 N. W. 642, 17 Ann. Cas. 1002, it is said:

'The most general words that can be devised * * * affect not the sovereign in the least, if they may tend to restrain or diminish any of his rights and interest.'" (Italics ours.)

The Federal Safety Appliance Act does not name the State of California or any other sovereign. The general language of the statute cannot affect the rights of the sovereign State of California.

Under the above well recognized and basic rules of construction, the second question certified by the United States Circuit Court of Appeals should be answered in the *negative*. Although these rules are *alone* sufficient to require such an answer, we will show in the next two subdivisions of this point, that the said Federal Safety Appliance Act *could not* legally include the State of California, even if the language of the statute purported to do so.

2. The United States Has No Right to Impose a Fine or Penalty Upon the State of California.

The Federal Safety Appliance Act properly fails to refer expressly to a State or other sovereignty because the provisions of said Act and particularly the penalty thereof could not be legally applicable to a sovereign state.

The real nature of the action brought in the District Court was *one by the United States to collect a fine or penalty against the State of California*. Such an action cannot be maintained.

The basic principles that the regulation of commerce between the several states is a power of the Federal Government, and that when exercised, the powers of the Federal Government, in this connection, are supreme, have not been overlooked.

However, there is nothing in the position of the State of California in this action, which, in any way, is contrary to or in denial of said powers. The State of California, through defendants as its Board of State Harbor Commissioners, operates and maintains

the Port of San Francisco, among the facilities of which are included the State Belt Railroad. The State of California attempts to do nothing in any way in violation of any superior law of the United States, applicable to its activities, nor to place any burden upon Interstate Commerce in connection therewith. In connection with the operation of said State Belt Railroad, the State of California neither owns nor controls any cars, nor has any depots, repair shops or any other means or facilities for the loading, handling or repair of cars. It does one simple thing only. It switches over its property from its docks to railroad yards and abutting industries, cars furnished to it by the said railroads. If any such car is being used in the transportation of Interstate Commerce, it is furnished to the State of California in San Francisco, by, and delivered or returned by said State of California in San Francisco, to a *railroad company engaged in Interstate Commerce.*

Any defective car found upon the tracks of the State of California, if used in Interstate Commerce, has been delivered to the State of California in said defective condition by such company. A single exception to the foregoing would involve a car becoming defective while on said State Belt Railroad and Section 4 of the Act of April 14, 1910 (36 Stat. 298), amending and supplementing the said Federal Safety Appliance Act, permits the movement *without penalty,* of such a car to the nearest available point where it can be repaired. For major repairs, such a point, in the case of the State Belt Railroad, would

be the yards of said interstate carrier to which said car was being taken. (R. 2, 3.)(Tr. 27)

Full and complete enforcement of the said Federal Safety Appliance Act can thus be had by compliance therewith by the said railroad companies, and enforcement against them.

The real nature of the action at bar is an attempt by the United States of America to *penalize the State of California for failing to prohibit the passage through its port (and in connection therewith, over its switching tracks) of cars owned and controlled by, and delivered to the said State of California by common carriers subject to the jurisdiction of the United States of America.*

A sovereign State is not liable for the misfeasances, malfeasances, non-feasances or negligence of its officers, agents or servants unless it has voluntarily assumed such liability.

This doctrine is established by authority so cogent and uniform that citation of authorities is almost unnecessary. The rule has been tersely expressed by this Honorable Court in

Robertson v. Sichel, 127 U. S. 507, 515; 32 L. Ed. 203, 206,

as follows:

> "* * * The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and diffi-

culties, and losses, which would be subversive of the public interests. Story, Ag. Par. 319, *Seymour v. Van Slyck*, 8 Wend. 403, 422; *U. S. v. Kirkpatrick*, 22 U. S. 9 Wheat. 720, 735 (6:199, 203); *Gibbons v. U. S.*, 75 U. S. 8 Wall. 269 (19:453); *Whiteside v. U. S.*, 93 U. S. 247, 257 (23:882, 885); *Hart v. U. S.*, 95 U. S. 316, 318 (24:479, 480); *Moffat v. U. S.*, 112 U. S. 24, 31 (28:623, 625); *Schmalz v. U. S.*, 4 Ct. Cl. 142."

Denning v. State, 123 Cal. 316 *(supra)*.

Rauschan v. State Comp. Ins. Fund, 80 Cal. App. 754 (supra).

A state cannot be sued as defendant in any Court in this country without its consent except in certain cases in the Supreme Court of the United States.

This principle is too well established to require extensive citation of authorities.

Cunningham v. Macon etc. R. R. Co., 109 U. S. 446; 27 L. Ed. 992.

In said case the Court stated (109 U. S. 451):

"It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any Court in this country without their consent except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on that Court by the Constitution.

This principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction * * *."

Certain exceptions were then discussed which are not applicable to the case at bar.

Smith v. Reeves, Treasurer of State of California, 178 U. S. 436; 44 L. Ed. 1140;

Constitution of the United States, Amendment Eleven.

Nor is this general rule changed or modified by the fact that the particular activity in question appears to be one sometimes engaged in by private individuals.

Riddoch v. State of Washington, 68 Wash. 329; 123 Pac. 450 (supra).

In said case, the contention was raised that the rule of non-liability applied to Governmental functions only and not to situations where the State was engaged in a private enterprise. The Court, after considering the rule relative to municipal corporations and their liability in certain instances, continued with the following clear exposition of the rule relative to a State, regardless of the type of the activity (68 Wash. 335):

> "On the other hand, *the state is inherently sovereign at all times and in every capacity.* It is the organized embodiment of the sovereign power of the whole people. By reason of this sovereignty, it possesses all powers, but only such powers as are within the limitations of the state constitution and without the prohibitions of the Federal Constitution. *It can do no act except in the exercise of this sovereign power* and within these constitutional limitations. If it may constitutionally take over any enterprise, though usually of the nature of a private business, the very taking over is an exercise of this sovereign power. *It seems much more logical and much more consonant with the idea and genius of*

sovereignty that the enterprise thus taken over should be impressed with the sovereign character of the state than that the state should become hampered by the private character of the enterprise. The latter result is incompatible with the concept of sovereignty." (Italics ours.)

The above portion of the opinion in *Riddoch v. State* was quoted and expressly approved in *Rauschan v. State Comp. Ins. Fund,* 80 Cal. App. 754, 766 (supra), and the same rule adopted by said Court. The State Compensation Insurance Fund, an agency of the State of California, was held not liable for the torts of its officers, agents or servants committed while in the discharge of their duties as such, because the immunity of a State from liability for such negligence applies regardless of the type of activity involved.

To construe the general language of the Federal Safety Appliance Act and particularly, the penalty provisions thereof to be applicable to a State or other sovereignty would involve the exercise by the United States of a power to fine or impose a penalty upon a sovereign state. The existence of such a power is incompatible with every basic idea of sovereignty and of the relationship between the State and Federal Governments.

The statute, therefore, cannot be construed as applying to the activities of the State of California now before this Honorable Court.

This matter is further discussed in its relation to fining or penalizing public officers in subdivision 3 of this point *infra.*

3. The United States Has No Right to Impose a Fine or Penalty Upon Officers of the State of California For Acts Occurring in the Regular Performance by Them of a Governmental Function of Said State.

The reasoning and rules above urged relating to the State, apply to the imposition of a fine or penalty upon *officers* of the State of California for acts occurring in the regular performance by them of a Governmental function of the State.

The Court will look behind the nominal parties and ascertain who are the real parties to the suit.

In re Ayers, 123 U. S. 443; 31 L. Ed. 216.

As has heretofore been shown, the real party to this action is the State of California as the owner and operator of the State Belt Railroad. The Board of State Harbor Commissioners are appointed by the Governor, confirmed by the Senate of the State of California, and hold office at the pleasure of the Governor.

Political Code of California, Section 2520.

> "On the passage of this act, the Governor must nominate, and by and with the consent of the Senate, appoint three State Harbor Commissioners. Any and all Harbor Commissioners heretofore or hereafter appointed shall hold office at the pleasure of the Governor * * *"

An action by or against a State officer as such is an action by or against the State.

In re Commonwealth of Kentucky v. William Dennison, Governor of the State of Ohio, 24 Howard 66, 16 L. Ed. 717;

Smith v. Reeves, Treasurer of the State of California, 178 U. S. 436, 44 L. Ed. 1140.

In holding said action to be one against the State itself, though in form, against an officer of the State, the Court held (178 U. S. 438):

> "Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers *as treasurer;* the relief sought is a judgment against that officer *in his official capacity;* and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint. * * *"

The above language of Mr. Justice Harlan is squarely in point in connection with the case now before this Court. This action is, in fact, an action against the State of California.

Hopkins v. Clemson Agricultural College, 221 U. S. 636, 642.

> "With the exception named in the Constitution, every state has absolute immunity from suit. *Without its consent it cannot be sued in any court, by any person, for any cause of action whatever.* And, looking through form to substance, the 11th Amendment has been held to apply, not only where the state is actually named as a party defendant on the record, *but where the proceeding, though nominally against an officer, is really against the state,* or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer, which seeks to compel him to exercise the state's power of taxation, or to pay out its money in his possession on the state's obligations, or to execute a contract, *or to do any affirmative act which affects*

the state's political or property rights." (Italics ours.)

Jurisdiction was sustained in said case because it was not an action against the College for a tort committed in the prosecution of a governmental function and because, while the fee was in the State, the corporation (College), as equitable owner, was in the possession, use and enjoyment of the property and did the acts complained of for its own corporate purposes and advantages. The Court held that the State was probably a necessary party as to the relief prayed affecting the land itself and, if so, the removal of an embankment could not be decreed unless the State consented to be sued. Other relief requested was held proper.

Said case is absolute authority for the proposition that the Courts will look behind the nominal parties and will not take jurisdiction where the action is really against the state and affects its political or property rights.

Interference with the activities of the Board of State Harbor Commissioners is a direct interference with the Executive Branch of the Government of the State of California, and affects its political and property rights.

The United States does not possess the right to fine or penalize officers of the sovereign states of the Union for acts occurring in the regular performance by them of a function of State Government.

This proposition would seem axiomatic. If authority be necessary, it is amply furnished by the cases

holding that a State and its Governmental agencies are not subject to taxation by the Federal Government.

> "The power to tax is the power to destroy."
> *M'Culloch v. Maryland,* 4 Wheat. (U. S.) 316; 4 L. Ed. 579.

As the power to tax is the power to destroy, so is the power to fine or penalize an even greater power to destroy!

A State agency is not subject to Federal taxation.

> "That the states cannot tax or otherwise impose burdens on the exclusive powers of the federal government or its instrumentalities employed to carry such governmental powers into execution is beyond question. *The same limitation rests upon the national government as to exclusive agencies of the states unless modified by the Sixteenth Amendment as to taxation which relates to incomes.* Weston v. Charleston, 2 Pet. 449, 7 L. Ed. 481; McCulloch v. Maryland, 4 Wheat. 316, 431, 439, 4 L. Ed. 579; Bank of Commerce v. New York City, 2 Black, 620; Collector v. Day, 11 Wall. 113, 124, 20 L. Ed. 122; United States v. Railroad Co., 17 Wall. 322, 21 L. Ed. 597; Railroad Co. v. Peniston, 18 Wall. 5, 21 L. Ed. 787; Knowlton v. Moore, 178 U. S. 59, 20 Sup. Ct. 747, 44 L. Ed. 969." (Italics ours.)
>
> *United States v. Board of Com'rs. of McIntosh County,* 271 Fed. 747, 750.

The salary of an officer of a State is not subject to Federal taxation.

Buffington v. Day, 78 U. S. 113; 20 L. Ed. 122.

In the course of its opinion in *Buffington v. Day, supra,* this Honorable Court stated:

"(127) * * * and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, *and the exemption of the officer from taxation by the general government,* stand upon as solid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in *Dobbins v. Erie Co. supra,* from taxation by the state; for, in this respect, that is, in respect to the reserved powers, the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases, the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; *as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?* (Italics ours.)

Paraphrasing the language of the above opinion, if the means employed by the Government of California in conducting the harbor of San Francisco are subject to fines and penalties imposed by the United States and the consequent control of the

United States, then the Government of California can exist only at the mercy of the United States. Of what avail is the Board of State Harbor Commissioners to the State of California if the United States can fine and penalize them at discretion?

Conclusion of Point B.

The Federal Safety Appliance Act does not expressly refer to a State or other sovereignty. The said Act and certainly the penalty provisions thereof could not legally apply to a sovereign State or to the officers or agents thereof in the course of the performance of their official duties. Therefore, the State Belt Railroad (owned and operated by the State of California) is not subject to said Act.

It is, therefore, respectfully submitted that the second question certified by the Circuit Court of Appeals should be answered in the *negative*.

POINT "C."

IF THE COMPLAINT AND JUDGMENT BE AGAINST DEFENDANTS IN THEIR OFFICIAL CAPACITY, THEN THE DISTRICT COURT DID NOT HAVE JURISDICTION OF THE ACTION.

The venue of any action against the State of California, brought by the United States Government, must be in the Supreme Court of the United States.

Constitution of the United States, Article III, Sec. 2.

> "*Original jurisdiction.* The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party,

except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. * * *"

Judicial Code, Sec. 233; Act of Cong. March 3, 1911, c. 231, Sec. 233, 36 Stat. 1156;

State of Rhode Island v. The State of Massachusetts, 12 Peters 657; 9 L. Ed. 1233;

United States of America v. The State of Texas, 143 U. S. 621; 36 L. Ed. 285.

The Court will look behind the nominal parties and ascertain who are the real parties to the suit.

In re Ayers, 123 U. S. 443; 31 L. Ed. 216 *(supra).*

An action by or against a State officer, as such, is an action by or against the State.

In re Commonwealth of Kentucky v. William Dennison, Governor of the State of Ohio, 24 Howard (U. S.) 66; 16 L. Ed. 717 *(supra);*

Smith v. Reeves, Treasurer of the State of California, 178 U. S. 436; 44 L. Ed. 1140 *(supra);*

Hopkins v. Clemson Agricultural College, 221 U. S. 636 *(supra).*

If the action be against defendants in their official capacity, then the United States District Court did not have jurisdiction of the action. It is, therefore, respectfully submitted that the answer to the third question should also be *"No."*

POINT "D."

THE JUDGMENT CANNOT BE SUSTAINED IF IT BE DEEMED AGAINST DEFENDANTS IN THEIR PRIVATE CAPACITY.

At the outset of the argument upon this point, we are confronted with the case of *McCallum v. United States*, 298 Fed. 373 (United States Circuit Court of Appeals for the Ninth Circuit), which was the first case involving the Federal Safety Appliance Act in connection with the operation of the State Belt Railroad.

The two main points raised in that case were:

First. That the action was one against the State of California, and therefore, contrary to the provisions of the Eleventh Amendment to the Constitution of the United States, and that, in any event, the District Court had no jurisdiction because the United States Supreme Court has the sole and original jurisdiction of an action against the State of California.

Second. That the State Belt Railroad was not a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act.

The United States Circuit Court of Appeals for the Ninth Circuit, in said case, decided *first*, that the action was not one against the State of California or against the Harbor Commissioners in their representative capacity, but was against them in their individual and private capacity to recover penalties for wrongful acts committed in violation of the laws of the United States, not by the State, but by individuals acting as its servants; that the State could not and did not authorize the commission of such wrongful acts, and the immunity of the State from suit did not

relieve state officers from responsibility for their alleged unlawful acts; and *second,* that the State Belt Railroad was a common carrier engaged in interstate commerce and must comply with the provisions of the Federal Safety Appliance Act. Petition for writ of certiorari was denied by the Supreme Court of the United States. (*McCallum v. United States,* 266 U. S. 606.)

The statement of law in *McCallum v. United States (supra),* that the immunity of the State from suit does not relieve State officers from responsibility for their own unlawful action, is unquestionably a correct statement of a general principle of law.

However, we are here concerned with a statute which imposes a *penalty upon a common carrier* and *not upon any individual,* and with a situation in which the individuals sought to be held, did not in any manner *personally participate* in the offense. These matters were *not* presented to and undoubtedly were *not* considered by the Court in the case of *McCallum v. United States (supra).*

It is respectfully submitted that in the said case, the basic fact was overlooked that the Board of State Harbor Commissioners individually and personally committed no wrong; that they individually and personally did no act which they were not authorized and empowered to do by the statutes of the State of California, and that they personally and individually did not violate any statute or law of the United States of America; that they had no more personal connection with any violation of the Federal Safety Appliance

Act occurring on the State Belt Railroad than has the president of an extensive railroad system for a similar violation occurring upon a remote part of that railroad, *and that the Federal Safety Appliance Act imposes a penalty upon the common carrier only and not upon any officer thereof, or any individual whomsoever.*

We believe that the certificate of questions submitted by the said United States Circuit Court of Appeals shows that said Court is no longer satisfied with the holding in *McCallum v. United States (supra)*. It certainly shows that said case is not considered authority by said Circuit Court upon the facts involved in the case now at bar.

It is respectfully submitted that the holding in *McCallum v. United States (supra)* is *erroneous* and that said case should be *overruled.*

1. Defendants Are Not Liable in Their Private Capacity, Because the Act Imposes a Penalty Only Upon the Carrier and Not Upon Any Individual or Officer Thereof.

The Federal Safety Appliance Act provides a penalty against a common carrier only and not against any individual officer or agent of such carrier.

The statute in question is of a quasi criminal nature making it unlawful to do certain acts and imposing a penalty by way of a fine for the commission of such unlawful acts. This statute makes the *common carrier* liable for said penalty but does *not* impose a penalty upon, nor authorize its collection from, anyone other than said common carrier.

The reasonableness of this provision is demonstrated by the fact that a showing of the exercise of reasonable care in equipping cars, as required by said Federal Safety Appliance Act, and the use of due diligence in keeping them in repair by the usual inspection is no defense to the penalty. It has been held that the statute imposes an absolute duty upon the *carrier* which is not discharged by the exercise of reasonable care or diligence.

Chicago, Burlington & Quincy Railway v. United States, 220 U. S. 559; 55 L. Ed. 582.

The placing of such a burden upon a common carrier and the placing of such a burden upon individual officers and employees are entirely different matters. Such a statute must be strictly construed, and its burdens and penalties imposed only as expressly provided in the statute, to wit, upon *the common carrier*.

If there was any doubt as to the construction of the Federal Safety Appliance Act, and the intention of Congress that it apply to *common carriers only*, this doubt is removed by a comparison of the Federal Safety Appliance Act and a somewhat similar statute, the Hours of Service Act. The comparable sections of the said acts are as follows:

FEDERAL SAFETY APPLIANCE ACT.

Act of Cong. March 2, 1893, c. 196, 27 Stat. 531, as amended by Section 1 of Act of Cong. March 2, 1903, c. 976, 32 Stat. 943. Said Section 2 reads as follows, to wit:

"That on and after the first day of January, 1898, it shall be *unlawful* for any such *common carrier* to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." (Italics ours.)

The penalty sought to be enforced is authorized by Section 6 of said Act, supra, 27 Stat., 532, as amended by Act of Cong. April 1, 1896, c. 87, 29 Stat. 85. The material part of this section reads as follows:

"That any such *common carrier* using any locomotive engine, running any train, or hauling or permitting to be hauled, or used on its line, any car in violation of any of the provisions of this Act, shall be *liable to a penalty* of $100.00 for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed * * *" (Italics ours.)

HOURS OF SERVICE ACT.

Act. of Cong. March 4, 1907, c. 2939, 34 Stat. 1415.

Section 1 of said Hours of Service Act commences by providing:

"That the provisions of this Act shall apply to the common carrier or carriers, *their officers, agents and employees*, * * *."

Section 2 of said Hours of Service Act, supra, 34 Stat. 1416, provides in part:

"That it shall be unlawful for any common carrier, *its officers* or *agents* subject to this Act, to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours. * * *" (Italics ours.)

And again, Section 3 of said Hours of Service Act, supra, 34 Stat. 1416 provides:

"That any such common carrier or *any officer or agent thereof* requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof *shall be liable* to a penalty of not to exceed $500.00 for each and every violation. * * *" (Italics ours.)

As hereinabove stated, the sections of the Amendment of 1910 to the Federal Safety Appliance Act herein involved are similar to those above quoted.

In the *Hours of Service Act,* also relative to common carriers engaged in interstate commerce, the *officers* are *expressly* mentioned and *expressly* made liable to the penalty provisions. No such mention of liability of officers or agents is found in the Federal Safety Appliance Act. *The common carrier only is mentioned.*

Congress, in its wisdom, very apparently sought to place the penalty, under the Federal Safety Appliance Act, on the industry only, but, in the Hours of Service Act, where a violation would involve the deliberate misconduct of an officer, the penalty is also placed upon the officer.

In view of the peculiar nature of the Federal Safety Appliance Act, the fact that due diligence is not a defense, and the fact that cars may become defective without fault of any person whomsoever, renders this distinction eminently just.

It therefore, conclusively appears that the Federal Safety Appliance Act assesses a penalty against the common carrier only and does not authorize the assessment of any penalty against any officer.

To sustain the judgment against defendants in their private capacity, plaintiff must establish that defendants *individually* constitute a common carrier. Such is not the fact.

The certificate of the Circuit Court of Appeals contains the following statement of fact:

"5. The Belt Line is operated by the State for the purpose of facilitating commerce of the Port of San Francisco, without any profit being derived therefrom. The charges made for the services rendered by the line are made pursuant to the authority conferred by Section 2524 of the Political Code of California which authorizes collection of such an amount of revenue as will enable the State officers to perform their duties as required of them by authority of Article IX of the Political Code. The defendants are appointive State officers and constitute what under the State statutes is designated as the Board of State Harbor Commissioners. They do not personally operate or supervise the operation of the Belt Line." (R. 4.) (Tr. 34, 25)

It is, therefore, clear that *if* the State Belt Railroad is a common carrier, then it is the State of California that is such carrier.

In an effort to sustain the judgment plaintiff may urge the theory found in some of its briefs in a similar case in the lower Court that

"while the Board of State Harbor Commissioners acted as authorized by law they acted as a 'Board,' i. e. an agency of the State of California, but at times they conducted the business of a common carrier in a manner not authorized by law. In this latter instance they ceased to act as an official agency. * * *"

Such a far fetched argument is utterly erroneous. There is no question here involved of the Board of State Harbor Commissioners exceeding their authority, or acting under an unconstitutional statute, or doing any of the acts or things which would deprive them of their official capacity and cause them to be acting individually, in contemplation of law.

They were authorized by statute to operate the State Belt Railroad and in operating it, they were performing a portion of their Governmental duties and functions as part of the executive branch of the Government of the State of California. They were conducting a railroad belonging to the State of California. The mere fact that on some part of the State Belt Railroad, a defective car was furnished for switching by some carrier, and inadvertently passed by an inspector does not change *ipso facto,* and by some mysterious process, the official character of these defendants. It is utterly absurd to assume that defendants are at one moment conducting the State Belt Railroad as a Board and agency of the State of California, and at the next, conducting it individually in their private capacity by the mere accident of a defective car being delivered for switching at a remote part of the road. The absurdity of that argument is shown by the fact that, were it correct, the members of the Board of State Harbor Commissioners would be forced to go to their homes in the evening not knowing whether, during the night, they would be conducting the State Belt Railroad as officers of the State of California or in their private capacity, and being powerless to prevent a midnight shift from one capacity to the other—a shift that on plaintiffs' theory, might cost them thousands of dollars in fines and yet occur from causes entirely beyond their control and power to prevent!

Such is not the law.

The Federal Safety Appliance Act does not impose a penalty upon any individual whomsoever. It im-

poses a penalty upon the carrier only. The defendants are not a common carrier in their private capacity and if the judgment be deemed to be against them in such private capacity, it cannot be sustained.

2. Defendants Are Not Liable in Their Private Capacity, Because of the Nature of the Alleged Infractions of Law.

(a) Defendants Cannot Be Held Personally Responsible for Violations of Law (or other tort) Occurring Without Their Personal Knowledge, Participation or Consent and Contrary to Their Orders and Instructions.

The certificate of facts of the Circuit Court of Appeals contains the following statement relative to the lack of personal connection of the defendants with the alleged infractions of law:

> "5. * * * The defendants are appointive State officers and constitute what under the State statutes is designated as the Board of State Harbor Commissioners. They do not personally operate or supervise the operation of the Belt Line. It is operated under the immediate and personal supervision of a superintendent who is appointed and holds office at the pleasure of the Board of State Harbor Commissioners and is under the supervision and control of that Board. His subordinates, inspectors, engineers, and yardmen employed in the operation of the railroad are Civil Service employees of the State, except in cases of emergency employment due to an unusual rush of business. All persons having to do with the maintenance and operation of the road are employees and servants of the State. Among such employees at the times mentioned in the complaint were five inspectors, whose duty it was to make inspections of all appliances covered by the Federal Safety Appliance Act and the orders of the Interstate Commerce Commission issued pursuant thereto."

"6. It is in terms stipulated that the defendants 'did not, in any manner, personally participate in, and had no personal knowledge whatsoever of the commission of any of the alleged violations of the Federal Safety Appliance Act set forth in the causes of action, or any of them, in the complaint herein. That if the violations * * *, or any of them, occurred the said violation so occurred without the personal knowledge of defendants, or any of them, and without the consent of defendants, or any of them, and contrary to the orders and instructions of defendants.'" (R. 4, 5.) (Tr. 28)

The portion of question 4 here under consideration is, whether or not, if the judgment be deemed to be against defendants in their private capacity, it can be sustained in view of the considerations:

"(b) That the defendants did not own or personally manage or operate the Belt Line, and the alleged infractions of the law were due to no act or omission upon their part and the wrongdoing was not only without their participation, consent, and knowledge but was contrary to their orders and instructions?" (R. 5, 6.)

There is no authority in the law for holding a public officer personally liable for the infraction of a law (or for any tort) with which he not only had no personal connection but which occurred contrary to his orders and instructions.

The liability of a public officer for his own wrong is clearly established, *but* is limited to *his own wrong.* An examination of any of the leading cases on this subject will clearly demonstrate this principle.

For instance, the decision in *Hopkins v. Clemson College*, 221 U. S. 636, 643, contains the following:

"But immunity from suit is a high attribute of sovereignty, a prerogative of the State itself, which cannot be availed of by public agents when sued for their *own* torts. The 11th Amendment was not intended to afford them freedom from liability in any case where, under color of their office, *they have* injured one of the State's citizens. To grant them such immunity would be to create a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law unless they are to be put above the law. For how 'can these principles of individual liberty and right be maintained, if when violated, the judicial tribunals are forbidden to visit penalties upon *individual offenders.* * * *'" (Italics ours.)

"Besides neither a State nor an individual can confer upon an agent authority to commit a tort so as to *excuse the perpetrator.*" (Italics ours.)

For the public officer to be *personally* liable, he must have *individually participated* in the commission of the tort. In the case at bar there was no such individual participation and the defendants herein cannot be held personally liable.

(b) Defendants as Public Officers Are Not Personally Responsible for the Torts of Their Subordinate Officers.

The principle that a public officer is not responsible for the acts or omissions of subordinate public officers is clearly established.

Michel v. Smith, 188 Cal. 199.

This case involved the liability of a Chief of Police for acts of a subordinate of his department. The Supreme Court of California, in holding the Chief of Police not personally responsible stated the general principle of law as follows (page 201):

"A public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done or has personally co-operated therein." (23 Am. & Eng. Ency. of Law, 382; Story on Agency, sec. 319; Robertson v. Sichel, 127 U. S. 507-515 (32 L. Ed. 203, 8 Sup. Ct. Rep. 1286, see also, Rose's U. S. Notes.) See also, note to 12 Ann. Cas. 184.)

Robertson v. Sichel, 127 U. S. 507, 32 L. Ed. 203.

In said case this Honorable Court held that a Collector of Customs was not personally responsible for the negligence of his subordinates in the Custom House department, and in the course of its opinion, stated the general principle as follows (page 515):

"*A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the non-feasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties.* Story, Ag. Par. 319." (Italics ours.)

In another part of its opinion discussing the facts of the particular case, the Court stated (page 514):

"We are of the opinion that there was error in the charge of the court, and that the defendant was not liable for the wrong, if any, committed by his subordinates, on the facts of this case. *There is nothing in the evidence to connect the defendant personally with any such wrong.* No evidence was given that the officers in question were not competent, or were not properly selected for their respective positions. The subordinate who was guilty of the wrong, if any, would un-

> doubtedly be liable personally for the tort, *but to permit a recovery against the Collector, on the facts of this case, would be to establish a principle which would paralyze the public service.* Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person. This principle is well established by authority. * * *" (Italics ours.)

The holding of Mr. Justice Blatchford speaking for the Court in *Robertson v. Sichel (supra),* is peculiarly applicable to the case at bar. Paraphrasing the language of said case, competent persons could not be found to fill the positions of California State Board of Harbor Commissioners if they knew they would be held liable for all the torts and wrongs committed by a body of subordinates operating the State Belt Railroad in the discharge of duties including the inspection of cars, which would be utterly impossible for the State Board of Harbor Commissioners to discharge in person. It would be entirely possible for one train load of cars switched a few miles in a few minutes, without any personal knowledge of the Harbor Commissioners, to involve fines to them approximately equal to a year's compensation. As has been well said by Mr. Justice Blatchford, such a holding establishes a principle which would paralyze the public service.

All persons having to do with the maintenance and operation of the State Belt Railroad are employees and servants of the State. (R. 4.) (Tr. 27) The method of

their employment and qualifications therefor are covered by paragraph 5 of the Facts in the Certificate of the Circuit Court of Appeals. (R. 5.)(Tr. 26-27)

As it affirmatively appears that these defendants had *no* personal connection whatsoever with any of the alleged infractions of the law and that if such occurred, it was *without* their knowledge or consent and *contrary* to their orders and instructions, and that the actual operation was under the supervision of properly selected subordinate employees of the State of California, there is no basis whatsoever for holding defendants liable in their private capacity for any penalty under the Act by reason of the alleged violations thereof.

Conclusion to Point D.

If the judgment be deemed to be against defendants in their private capacity, it cannot be sustained.

The Act imposes a penalty only upon the *carrier,* and not upon any individual. Defendants are *not* a common carrier in their private capacity. Furthermore, defendants cannot be held liable in their private capacity for an alleged infraction of the law due to *no* act or omission upon their part and occurring *not only without* their personal consent, participation and knowledge, *but contrary to their order and instructions.* Defendants cannot be held personally liable for torts of subordinate officers.

It is, therefore, respectfully submitted that the answer to the fourth question certified by the Circuit Court of Appeals should also be in the *negative.*

VI.

CONCLUSION.

In conclusion we submit that all of the questions certified to this Honorable Court by the said United States Circuit Court of Appeals should be answered in the negative.

The State Belt Railroad (owned and operated by the State of California), is not engaged in interstate commerce within the meaning of the Federal Safety Appliance Act. The State of California does *not engage* in *any* commerce.

The Federal Safety Appliance Act does not expressly refer to the State of California, or any other state or sovereignty. It could not legally refer to such sovereignty. The State Belt Railroad (owned and operated by the State of California) is, *not* subject to the Federal Safety Appliance Act.

The United States District Court did not have jurisdiction of this action, if the complaint and judgment be construed as running against defendants in their official capacity.

The judgment *cannot* be sustained if it be deemed to be against defendants in their private capacity, because the Act imposes a penalty *only* upon the "carrier" and defendants are *not* a "carrier" in their private capacity. Furthermore, such a judgment cannot be sustained because it affirmatively appears in the record that the defendants did not own or personally manage or operate the State Belt Railroad, that the alleged infractions of law were due to no act or omission upon their part and that the wrong-doing was

not only without their participation, consent and knowledge, but was contrary to their orders and instructions. Defendants *cannot* be held personally liable for such alleged infractions of law.

The foregoing propositions are in accord with basic and well established principles of law and are amply supported by the authorities.

All of the questions certified by the United States Circuit Court of Appeals must be answered in the negative. Such answers will establish rules of law which will permit the proper exercise by the State of California of a portion of its sovereign power, to wit, maintaining and operating its Port of San Francisco, unhampered and unburdened by fines and penalties imposed by another sovereign power. Under such rules of law, persons of responsibility may act as members of the Board of State Harbor Commissioners without fear that their private means will be unjustly subjected to penalties for alleged wrongful acts which occur contrary to their orders and instructions and over which they have no control.

Such answers will not, in any way, interfere with or hamper the United States in enforcing the provisions of the Federal Safety Appliance Act. There is no conflict between the State of California and the United States in this matter. The State even employs special inspectors who, through their inspection of appliances covered by the Federal Safety Appliance Act, cooperate in its enforcement. But the State and its officers *need not* and *cannot* be penalized because the railroad companies engaged in interstate commerce, owning and operating defective cars, deliver

them to the State Belt Railroad for switching. Complete enforcement of the Federal Safety Appliance Act can and should be had by proceeding against said companies, who are the real and only ones at fault.

We submit that the questions of law certified to this Honorable Court by the United States Circuit Court of Appeals for the Ninth Circuit, should *all* be answered in the *negative*.

Dated, San Francisco,
March 26, 1930.

Respectfully submitted,

LEON E. MORRIS,
Counsel for Appellants.

EDWARD M. JAFFA,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this_____day of March, 1930.

_____

United States Attorney,

_____

Assistant United States Attorney,
Counsel for Appellee.

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(34,617)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929—No. 486

OCTOBER TERM, 1930—No. 14

WILLIAM A. SHERMAN, M. F. COCHRANE, and J. B. SANFORD, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

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SUPPLEMENTAL BRIEF FOR APPELLANTS.

I.

OPINION OF THE COURT BELOW.

This case originally came before this Court on certified questions of law from the Circuit Court of Appeals for the Ninth Circuit, and, therefore, no opinion by the Court below has been rendered or is involved.

II.

JURISDICTION.

Said questions were certified by said United States Circuit Court of Appeals pursuant to Judicial Code Section 329, as amended in 1925. Act of Cong. Feb. 15, 1925, C. 229, Sec. 1, 43 Stat. 938.

The joint motion of both parties hereto for a writ of certiorari to bring up the entire record and cause was granted by this Honorable Court on May 5, 1930. (Tr. 58.)

III.

STATEMENT OF CASE.

A full and complete brief has heretofore been filed in this Honorable Court on behalf of appellants. This brief was filed prior to the making of the motion to bring up the entire record and contains a complete discussion of their argument upon the questions of law certified by the United States Circuit Court of Appeals.

The only issues involved in this appeal are the determination of the basic questions of law so certified. There are no other issues involved, and the determination of the said questions will completely decide the entire appeal.

This action is in the nature of a test case and was submitted upon an agreed written stipulation of facts for the purpose of squarely presenting the essential and vital points involved in the question of what liability, *if any,* rests upon Board of State Harbor

Commissioners of the State of California, either in their official capacity as officers of the State (i. e. liability of the State of California), or in their private capacity as individuals, for violations of the Federal Safety Appliance Act, *occurring without their personal participation, without their knowledge or consent, and contrary to their orders and instructions.*

Appellants joined in making the motion to bring up the entire record solely to enable this Honorable Court to examine the entire agreed stipulation of facts above referred to (Tr. 24 to 40) should it so desire.

We believe that the Court can best consider the questions of law involved in this appeal on the basis of the certificate from the United States Circuit Court of Appeals and the questions therein certified. We believe that any further argument on the merits would involve useless repetition and be merely a burden upon the Court.

We, therefore, respectfully refer the Court to the brief heretofore filed on behalf of appellants for a consideration and discussion of the questions of law involved in this appeal. We will confine this supplemental brief to a succinct discussion of the relation of the answers to said questions to the disposition of the cause and will also set forth the assignments of error relied upon in the appeal.

For the convenience of the Court, we have arranged to amplify the record references in the brief heretofore filed. The printed references under the letter capital "R" refer to the certificate from the United States Circuit Court of Appeals. The additional hand-

writing references designated by capital "Tr." refer to the Transcript of Record subsequently filed pursuant to the granting of the motion to bring up the entire record. Similar designations are used in this brief.

In the certificate of the United States Circuit Court of Appeals, the appellants are referred to as "defendants" and for convenience, they will be hereinafter so referred to.

Briefly, and without attempting to cover or repeat the statement of the case contained in the original brief, the defendants are appointive State officers of the State of California, and constitute the Board of State Harbor Commissioners, and have jurisdiction over the Harbor of San Francisco, California. In connection with the maintenance of this harbor, the State of California owns and operates the State Belt Railroad for the purpose of rendering switching services only. The said railroad is under the general jurisdiction and supervision of said Board of State Harbor Commissioners.

The acts complained of are violations of the provisions of the Federal Safety Appliance Act, occurring upon the said State Belt Railroad but involving cars furnished to said road by various common carriers for switching. The defendants did not personally operate or supervise the operation of the State Belt Railroad, and if any violations of the Federal Safety Appliance Act occurred upon the said railroad, they occurred without the personal knowledge of defendants or any of them and without the consent of

defendants or any of them and contrary to the orders and instructions of defendants. (R. 4, Tr. 28.)

The United States District Court entered judgment for nine hundred ($900.00) dollars against William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad. (Tr. 22.)

The defendants urge that they are *not* liable *either* in their official capacity as officers of the State of California, *or* in their private capacity as individuals, for any such violations of the Federal Safety Appliance Act. Their contentions are summarized in detail in the opening of the argument infra.

IV.

SPECIFICATION OF ERRORS RELIED UPON.

The errors committed by the District Court and urged on this appeal are the following:

1. That the said District Court erred in overruling defendants' demurrer and denying defendants' motion to dismiss.

2. That the evidence was and is insufficient to justify the decision and judgment of the said District Court.

3. That the judgment of the District Court is contrary to the evidence.

4. That the District Court erred in rendering and entering judgment against defendants.

5. That the District Court erred in adjudging that the Federal Safety Appliance Act imposes or authorizes the imposition of a fine or penalty upon defendants individually.

6. That the District Court erred in adjudging that defendants, as members of the Board of State Harbor Commissioners, were liable for torts of subordinate officers.

7. That the District Court erred in adjudging that it had jurisdiction over officers of the State of California acting in their official capacity.

8. That the District Court erred in imposing a fine or penalty upon officers of the State of California for acts occurring in the regular performance by them of a governmental function.

9. That the District Court erred in adjudging that the State Belt Railroad is a common carrier engaged in interstate commerce by railroad within the meaning of the Federal Safety Appliance Act.

All of the assignments of error are relied upon. Said assignments more specifically cover some of the errors above named and appear on pages 44 to 48 inclusive of the transcript.

V.

CERTIFIED QUESTIONS OF LAW.

The following questions of law are certified to this Honorable Court by the said United States Circuit Court of Appeals (R. 5, Original Brief, 5):

1. Is the State Belt Railroad a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act?

2. If No. 1 is answered affirmatively, is the State Belt Railroad (owned and operated by the State of California) subject to the Safety Appliance Act, which by general language imposes duties upon "any common carrier engaged in interstate commerce" but does not expressly refer to a State or other sovereignty? *(Guarantee Company v. Title Guaranty Company,* 224 U. S. 152, 155, et seq.)

3. If this question also is answered in the affirmative, and if the complaint and the judgment be construed as running against the members of the Board of State Harbor Commissioners, in their official capacity, and hence in a sense against the State, did the District Court have jurisdiction of the action?

4. Upon the other hand, if the judgment be deemed to be against the defendants in their private capacity, can it be sustained in view of the considerations:

(a) That the Act imposes penalties only upon the "carrier"; and

(b) That the defendants did not own or personally manage or operate the Belt Line, and the alleged infractions of the law were due to no act or omission upon their part and the wrongdoing was not only without their participation, consent, and knowledge, but was contrary to their orders and instructions?

VI.

ARGUMENT.

The argument in the original brief (page 6) follows the order of the above questions and is summarized as follows:

Summary of Argument.

Point A. That the State Belt Railroad (owned and operated by the State of California) is not a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act.

Point B. That the State Belt Railroad (owned and operated by the State of California) is not subject to the Federal Safety Appliance Act. The Federal Safety Appliance Act does not expressly refer to a State or other sovereignty and therefore, does not apply thereto. It could not properly so apply because the United States has no right to impose a fine or penalty upon the State of California or upon the officers of the State of California, for acts occurring in the regular performance by them of a Governmental function of said State.

Point C. That if the complaint and judgment be construed as running against the members of the Board of State Harbor Commissioners in their official capacity and hence against the State, then the District Court of the United States did not have jurisdiction of the action.

Point D. That if the judgment be deemed against defendants in their private capacity, then it cannot be sustained, because

(a) The Act imposes a penalty upon the "carrier" only and *not* upon any individual or officer thereof;

(b) Defendants did not own or personally manage or operate the Belt Line; the alleged infractions of law were due to no act or omission upon their part and the wrongdoing was not only without their participation, consent and knowledge but also contrary to their orders and instructions. The defendants cannot be held liable in their private capacity for such infractions of law. The defendants are not personally liable for the torts of their subordinate officers.

INTRODUCTION.

In this portion of this brief we will not repeat any of the argument contained in the original brief, but will confine the discussion to a brief correlation of the determination of the questions presented in the summary of the argument and the questions of law certified by the United States Circuit Court of Appeals, and the effect thereof upon the determination of the case.

POINT "A."

THE STATE BELT RAILROAD (OWNED AND OPERATED BY THE STATE OF CALIFORNIA) IS NOT A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE.

The Federal Safety Appliance Act relates only to common carriers engaged in interstate commerce.

Unless, therefore, the State Belt Railroad is engaged in interstate commerce within the meaning of

the Federal Safety Appliance Act the plaintiff cannot recover in this action.

If this Honorable Court determines that the said State Belt Railroad (owned and operated by the State of California) is not a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act, then the first question certified by the United States Circuit Court of Appeals must be answered in the *negative*, and the judgment of the District Court must be *reversed*.

POINT "B."

THE STATE BELT RAILROAD (OWNED AND OPERATED BY THE STATE OF CALIFORNIA) IS NOT SUBJECT TO THE FEDERAL SAFETY APPLIANCE ACT.

This point involves a discussion of the second question of law certified by the United States Circuit Court of Appeals. It raises the points that the Federal Safety Appliance Act, by its terms, does not apply to a State or other sovereignty, and that at least in so far as the penalty provisions thereof are concerned (and those are the ones here under discussion), said Act could not be made legally applicable to a sovereign State, or the officers thereof for acts occurring in the regular performance by them of a governmental function of said State. In other words, the United States has no right to impose a fine or penalty upon the State of California, or any of its officers for performance by them of a governmental function.

Obviously, plaintiff cannot recover unless the Federal Safety Appliance Act is legally applicable to the

State Belt Railroad (owned and operated by the State of California)—unless said railroad, so operated, is subject to said Act.

Therefore, if this Honorable Court agrees with defendants' contentions upon this point and answers the second question of law certified by the United States Circuit Court of Appeals in the *negative*, then the judgment of the District Court must be *reversed*.

POINT "C."

IF THE COMPLAINT AND JUDGMENT BE AGAINST DEFENDANTS IN THEIR OFFICIAL CAPACITY, THEN THE DISTRICT COURT DID NOT HAVE JURISDICTION OF THE ACTION.

If both questions 1 and 2 certified by the United States Circuit Court of Appeals are answered in the affirmative, then, and then only, does it become necessary to consider questions 3 and 4 so certified, and points "C" and "D" of the argument. As above indicated, negative answers to the said first two questions, or either of them, require a reversal of the judgment of the District Court.

Should the said first two questions be answered in the affirmative, it then becomes necessary to determine whether the action be deemed to be one against the Board of State Harbor Commissioners in their official capacity and hence, in a sense, against the State. If this be the nature of the action, then it is defendants' contention that the District Court did not have jurisdiction of the action.

If this Honorable Court agrees with defendants' contention in this particular, and answers the third question of law certified by the United States Circuit Court of Appeals in the *negative,* then the judgment of the District Court must be *reversed.*

POINT "D."

THE JUDGMENT CANNOT BE SUSTAINED IF IT BE DEEMED AGAINST DEFENDANTS IN THEIR PRIVATE CAPACITY.

If the first two certified questions of law be answered in the affirmative, and the judgment be deemed to be not one against the State Harbor Commissioners in their official capacity, but rather against them in their private capacity, then the defendants contend the judgment of the District Court cannot be sustained because:

(a) The Act imposes a penalty upon the carrier only and not upon any individual or officer thereof, and

(b) Defendants do not own or personally manage or operate the Belt Line; the alleged infractions of law were due to no act or omission upon their part and the wrongdoing was not only without their participation, consent or knowledge, but also contrary to their orders and instructions. The defendants cannot be held liable in their private capacity for such infractions of law. They are not liable for the torts of their subordinate officers.

This point is raised last in appellant's brief and the question relating thereto was, we believe, placed

in the fourth position by the United States Circuit Court of Appeals, because it only becomes material if the two first questions are answered in the affirmative and if the action be nevertheless deemed one against defendants in their individual capacity and *not* in their official capacity

To sustain the judgment against defendants in their individual capacity plaintiff must prove; first, a statute assessing or authorizing a penalty against some *individual* and, secondly, that the defendants have *individually* and *personally* rendered themselves liable to such penalty by reason of some act committed or omitted by them *personally* and *individually*.

As above stated, defendants contend that they cannot be held liable in their individual capacity, under the provisions of the Federal Safety Appliance Act, and upon the facts involved in this action. If this Honorable Court agrees with defendants' contention in this particular, then the fourth question of law certified by the United States Circuit Court of Appeals should be answered in the *negative*, and the judgment must be *reversed*.

VII.

CONCLUSION.

Defendants and appellants have shown that the judgment of the United States District Court cannot be sustained upon any theory.

If the State Belt Railroad, owned and operated by the State of California, is not a common carrier en-

gaged in interstate commerce within the meaning of the Federal Safety Appliance Act, the judgment must be reversed.

If the State Belt Railroad (so owned and operated) is such a common carrier, but nevertheless is not subject to the Federal Safety Appliance Act, then the judgment must be reversed.

If the State Belt Railroad is such a common carrier and is subject to said Federal Safety Appliance Act, and the judgment be construed as running against the Board of State Harbor Commissioners in their official capacity and hence against the State, then the judgment must be reversed because the District Court did not have jurisdiction of the action.

If, on the other hand, the State Belt Railroad is such a common carrier and is subject to said Federal Safety Appliance Act, but the judgment be deemed to be against defendants in their private capacity, *then also it must be reversed,* because the Act imposes a penalty upon the *carrier* only, and not upon any individual or officer thereof; and, further, because the defendants did not own or personally manage or operate the Belt Line, and the alleged infractions of law were due to no act or omission on their part and the wrongdoing was not only without their participation, consent and knowledge, but was contrary to their orders and instructions.

In our conclusion to the original brief we summarized the argument and demonstrated that all of the questions of law certified by the Circuit Court of Appeals should be answered in the *negative.* Such

answers *require a reversal* of the judgment of the District Court.

In conclusion then, we respectfully refer this Honorable Court to our original brief heretofore filed herein for a complete argument upon all questions involved in the appeal, and respectfully submit that the questions of law certified to this Honorable Court by the United States Circuit Court of Appeals, for the Ninth Circuit, should *all* be answered in the *negative* and the judgment of the District Court *reversed.*

Dated, San Francisco,
October 6, 1930.

Respectfully submitted,

LEON E. MORRIS,
Counsel for Appellants.

EDWARD M. JAFFA,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this_____day of October, 1930.

_____

United States Attorney,

_____

Assistant United States Attorney,
Counsel for Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 14.

WILLIAM A. SHERMAN, M. F. COCHRANE, AND J. B. SANFORD, CONSTITUTING THE BOARD OF STATE HARBOR COMMISSIONERS OF THE STATE OF CALIFORNIA, OPERATING THE STATE BELT RAILROAD,

vs.

THE UNITED STATES OF AMERICA.

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF APPELLANTS.

LEON E. MORRIS,
Counsel for Appellants.

EDWARD M. JAFFA,
KARL D. LOOS,
Of Counsel.

Washington, D. C.,
October 28, 1930.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF OF APPELLANTS.

I.

The significance of the term "State Belt Railroad" should be understood and kept in mind. That

term does not designate an artificial person or an entity of any kind. It is a name that has been applied by custom to the tracks along the San Francisco waterfront. These tracks were laid under the authority of the following paragraph of Section 2524 of the Political Code of California:

> "Said board may, when the wants of commerce require, lay down such number of tracks along and on any portion of said waterfront as may be necessary to meet such wants, and permit the use thereof to any corporation or association, or any person or persons, under such rules, regulations, and at such compensation as said Board may determine; * * *"

The State Belt Railroad is thus merely certain property used by the Board of State Harbor Commissioners in the performance of its function of providing and maintaining San Francisco harbor. That function is a governmental function and not a private business. To whatever extent the Board may perform a carrier service in the operation of the State Belt Railroad, such carrier service is a mere incident to the governmental function of providing and maintaining a harbor and the performance of such an incidental carrier service does not render the State Board of Harbor Commissioners or the members thereof or the State of California, a common carrier.

If we are correct in this view, the argument in the Government's brief that a State engaged in the operation of a railroad as in *Georgia v. Chattanooga*, 264 U. S. 472, is engaged in a private business, has no application to this case.

On the other hand, if the operation of the State

Belt Railroad is to be segregated from the governmental function of the State Board of Harbor Commissioners and to be treated as the State engaged in a private business and if such private business be held to be that of a common carrier, it becomes important to determine with precision who is the common carrier. We submit that if the State Belt Railroad is a common carrier, then it is the Board of State Harbor Commissioners in their official capacity or the State of California that is such carrier.

II.

The brief of the United States (pp. 21-30), argues that the suit is against the defendants Sherman, Cochrane and Sanford, individually and in their private capacity and contends that they are the common carrier just as a receiver of a railroad is a common carrier, citing *United States v. Nixon*, 235 U. S. 231.

However, a receiver can be a common carrier only in his capacity as a receiver.

Moreover, a receiver is not personally liable for acts done by him in his capacity as a receiver; and his personal property cannot be subjected to the debts and liabilities of the company or property for which he is receiver. The United States contends (brief, p. 25) that the judgment here involved was against the appellants individually and that in the enforcement of the judgment no relief against the State will be necessary, clearly intimating that the private property of the individual members of the Board of Harbor Commissioners named as defendants will be subjected to levy for the payment of the judgment in question.

Even if the Board of Harbor Commissioners, as an

entity, should be considered to be a common carrier in its function of operating the State Belt Railroad, that would not warrant a judgment against the individual members of the Board in their private capacity. The Board of State Harbor Commissioners in operating the State Belt Railroad are acting in their official capacity. The statute imposes the penalty only upon the carrier and not upon the officers, agents or employees of the carrier.

The present judgment cannot be sustained unless it be held that Messrs. Sherman, Cochrane and Sanford, in their individual and private capacity, constituted a common carrier. Such a holding is hardly possible, because these individuals in their private capacity did not have any possession, control or any authority whatsoever with respect to the rails or equipment of the State Belt Railroad.

The theory of the contention of the United States that defendants constituted a common carrier in their individual capacity is based upon a misconception of law and fact. The Harbor Commissioners are authorized by State statute to operate the State Belt Railroad and in so doing they are acting in their official capacity pursuant to law. The mere fact that in the course of such operation unlawful acts occur without their personal participation and contrary to their orders and instructions cannot change their maintenance and operation of the State Belt Railroad from a lawful to an unlawful one; cannot change the capacity in which the operation is conducted from an official to a private one. The arguments and authorities in the Government's brief relating to the personal wrongdoing of a State officer are not in point because it affirmatively appears from the record herein that defendants not only did not personally par-

ticipate in the offenses and had no knowledge of them but that they occurred contrary to their orders and instructions. There would, therefore, be no basis for holding defendants liable even if the statute did impose a penalty upon an officer or agent guilty of a violation. But the statute contains no such provision.

The absolute liability imposed by the Safety Appliance Act (Ch. 87, 29 Stat. L. 85) (brief of the United States, pp. 26-27), is imposed only upon the carrier; no penalty whatever is imposed upon officers or agents of the carrier. Referring to the argument of the Government commencing on the bottom of page 28 of its brief, it should be borne in mind that there is no question involved of an affirmative failure of the State of California or its officers to comply with any law or safety regulation. The defective cars were furnished to the State of California for switching by railroad companies engaged in interstate commerce. Complete enforcement of the Federal Safety Appliance Act can be had and the safety of employees assured by proceeding against the said railroad companies.

III.

The brief for the United States argues that the rule that a sovereign is not bound by words of a general statute unless named therein, is limited to the enacting sovereign. While the cases in which the rule has been applied have been cases involving the enacting sovereign, we urge that the rule should be applied in like manner to equal and coordinate sovereigns as the State and National governments. We have found no authority denying the application of

the rule to such dual sovereignties and none is cited in the Government's brief.

The Government also contends that the provision of the Judicial Code giving this Court exclusive jurisdiction of all controversies of a civil nature where a State is a party (with exceptions not here pertinent) was modified and amended by Section 6 of the Safety Appliance Act authorizing suit for recovery of penalties to be brought in the District Court. We think the general language of Section 6 of the Safety Appliance Act is not sufficient to repeal the specific declaration of policy that the Supreme Court shall have exclusive original jurisdiction of suits involving a State.

We believe the inference to be drawn from the absence of any provision giving jurisdiction to enforce the penalty against a State is that Congress did not intend such penalties to be applicable against a State.

The United States apparently has treated this action as one against defendants individually. The defendants named in the suit ceased to be officials of the State or members of the Board of Harbor Commissioners before trial and before judgment was entered. (Tr. 40.) If the suit was originally intended as one against the Board of Harbor Commissioners, in their official capacity, the proper procedure would have been to substitute the successors in office for the defendants originally named. *Murphy v. Utter,* 186 U. S. 95; *Irwin v. Wright,* 258 U. S. 219.

Treated as a suit against the individual members of the Board, in their private capacity, the defendants are not a common carrier, and the judgment cannot be sustained because the statute imposes the penalty only upon the carrier and not upon its officers or agents.

The other points raised by the Government are fully answered in our original brief.

It is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

LEON E. MORRIS,
Counsel for Appellants.

EDWARD M. JAFFA,
KARL D. LOOS,
Of Counsel.

Washington, D. C.,
October 28, 1930.

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No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1930

WILLIAM A. SHERMAN, M. F. COCHRANE, AND J. B. SANFORD, CONSTITUTING THE BOARD OF STATE HARBOR COMMISSIONERS OF THE STATE OF CALIFORNIA, ETC.

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 14

WILLIAM A. SHERMAN, M. F. COCHRANE, AND J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, etc.

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by either the United States Circuit Court of Appeals for the Ninth Circuit or by the United States District Court for the Northern District of California.

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court November 19, 1929. On May 5, 1930, this Court granted a joint motion for a writ

of certiorari to bring up the entire record and cause. (R. 58.)

Jurisdiction of this Court is conferred by Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented on the entire record are essentially the same as those certified. These questions are:

1. Whether the State Belt Railroad, hereinafter described, is a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act.

2. Whether the suit against appellants (below) is a suit against the State of California and, if not, whether appellants, as the operators of the State Belt Railroad, are liable for violations of the Federal Safety Appliance Act committed in the operation of that railroad.

3. Whether, if this is a suit against the State of California, the Federal Safety Appliance Act applies to the operations of the State Belt Railroad and gives the United States District Court jurisdiction of the suit.

STATUTES INVOLVED

The applicable statutory provisions are set forth in Appendix A, pp. 36–39, *infra*.

STATEMENT

This action was brought by the United States in the District Court against the members of the

Board of State Harbor Commissioners of the State of California (sometimes hereinafter referred to as appellants), as operators of the State Belt Railroad, to recover statutory penalties for violations of the Federal Safety Appliance Act and the Supplemental Act of April 14, 1910.

The complaint alleged nine separate violations of the Act by the appellants, all in the month of October, 1925. (R. 2–12.) The first and third causes of action alleged two separate violations of the order of the Interstate Commerce Commission, dated October 10, 1910 (Appendix B, pp. 39–40, *infra*), made pursuant to the third section of the Act of April 14, 1910 (p. 38, *infra*), which required that the minimum height of drawbars for freight cars on standard-gauge railroads should be 31½ inches. The second, fourth, fifth, eighth, and ninth causes of action alleged five separate violations of Section 2 of the Safety Appliance Act of 1893, as amended by Section 1 of the Act of March 2, 1903 (pp. 36–37, *infra*), which made it unlawful for any common carrier engaged in interstate commerce to haul cars on its line not equipped with couplers coupling automatically by impact. The sixth and seventh causes of action alleged two separate violations of Section 2 of the Act of April 14, 1910, which requires that all cars shall be equipped with efficient hand brakes (p. 38, *infra*).

A jury trial having been waived in writing, the case was tried on stipulated facts (R. 24–40) and judgment was entered for the United States for

$900, being the statutory penalty of $100 for each of the nine separate violations of the Act (R. 22–23). Upon appeal to the Circuit Court of Appeals certain questions of law were certified to this Court. (R. 57–58.) Thereafter this Court granted a joint motion to bring up the entire record and cause. (R. 58.)

The stipulation of facts recites the testimony bearing upon the violations of the Safety Appliance Act alleged in the complaint which witnesses for the Government and for the State Belt Railroad would give if called. (R. 34–39.) The certificate of the Circuit Court of Appeals states (p. 5):

> Further facts are stipulated in respect to the specific alleged violations from which it appears that if what was done and omitted had been done or omitted by an ordinary common carrier engaged in interstate commerce such acts and omissions would admittedly constitute violations of the Safety Appliance Act.

The physical facts with respect to the State Belt Railroad are stated in the certificate of the Circuit Court of Appeals substantially as follows (pp. 2–4): The railroad is located wholly within the city of San Francisco and is about five miles in length. It is near the San Francisco harbor and runs approximately parallel with the water front, between wharves on one side and numerous industrial plants on the other. The railroad has physical connections with the tracks of the Southern Pacific Railroad

Company from which it receives and to which it delivers cars. Short spurs connect the State Belt Railroad with the industrial plants, which are approximately 175 in number, and the wharves, of which there are 45. The wharves are owned by the State of California and used by the freight-car ferries of the Southern Pacific Company, the Atchison, Topeka and Sante Fe Railway Company, the Western Pacific Railway Company, and the Northwestern Pacific Railway Company, all common carriers engaged in interstate commerce.

Adjacent to the main line of the State Belt Railroad and connecting therewith are certain freight yards of the four interstate carriers, owned by the State of California but used by the carriers under lease or agreement. In these yards all the switching is done by the State Belt Railroad, and all cars going into and out of these yards are hauled by that railroad. None of the tracks of the State Belt Railroad, either main or spur, is ever used by any of the interstate carriers above named, and no locomotive other than the locomotives of the State Belt Railroad ever moves on any part thereof. The railroad has no cars or other rolling stock except locomotive engines.

With reference to the movement of freight cars on the line of the State Belt Railroad, the stipulation states (R. 29–31):

> That one hundred and seventy-five (175) industries and forty-five (45) wharves and car ferries referred to are served exclusively

by the State Belt Railroad, in so far as the movement of loaded and empty cars are concerned. The State Belt Railroad moves all carload freight from these industries and wharves destined and consigned to points both within and without the State of California, either on or beyond the lines of the four interstate carriers. It likewise receives from these four carriers, carload shipments of freight, originating within and without the State of California and destined and consigned to industries on the line of the State Belt Railroad, and delivers same to the consignees. It also delivers to the various steamship lines using the forty-five (45) wharves in question, cars, loaded and unloaded, for delivery to the carrier railroads, and likewise receives cars from such carrier roads for delivery to such wharves, for further transportation to points within and without the State of California. The State Belt Railroad also moves over its lines all cars, loaded and empty, between the yards of the four railroads referred to and the various wharves and transfer tracks heretofore mentioned. These last-mentioned cars are either for shippers or consignees who do not have industrial tracks or private sidings of their own, who obtain cars and load them themselves, and hire the State Belt Railroad to transport such cars either to the carrier roads or along the water front as the case may be. These cars are loaded by shippers before the State Belt Railroad switches the same and are un-

loaded by the shippers after the State Belt Line spots them for unloading. No freight is ever loaded or unloaded by said State Belt Railroad. Of all the cars and movements mentioned herein, no discrimination is made between cars owned by railroads operating within the State of California and those operating wholly without. The State Belt Railroad moves all cars offered to it by the railroads in question, the various steamship lines using the forty-five (45) wharves, and the one hundred and seventy-five (175) industries referred to. The cars used by the steamship companies are turned over to the State Belt Railroad for hauling in the same manner that cars are received from the carrier roads, i. e., the cars are furnished by the steamship companies and are committed to the State Belt Railroad for the movement requested and for no other purpose. For such services performed for the steamship companies in hauling said last-mentioned cars, the usual switching charge is made just as in the matter of cars received from, and delivered to, carrier roads. The State Belt Railroad also moves between the Presidio and the steamship docks, car-ferry wharves and transfer tracks heretofore mentioned, cars originating without the State of California and consigned to the Presidio, or *vice versa.*

The State Belt Railroad is not a party to any through rate for the transportation of any shipment but charges a flat rate for moving cars over

its line. (R. 31.) It does not move shipments on through waybills, nor does it issue any waybill or give any receipt whatever, but cars are moved by it on so-called "switch lists." (R. 31–32.)

Switch lists are made out, in the case of inbound freight shipments, by the carrier or steamship line, and show the number and initials of the car, whether loaded or empty, and points of delivery or final destination on the State Belt Line. The original waybill is retained by the carrier delivering the car to the State Belt Railroad. The transportation charge for the movement by the State Belt Railroad is absorbed by the carrier from whom the car is received. On outbound shipments the switch list is made out by an agent of the carrier to whom the car is to be delivered by the State Belt Railroad, and shows the number and initials of the car, whether loaded or empty, and the name of the shipper. Concurrently with the making of such switch list, the agent of the carrier, having received a shipping order from the consignor, makes out and delivers to the carrier a waybill showing, in addition to the things heretofore mentioned, the consignor, the point of origin as San Francisco, and the ultimate destination of the car. The car is then moved on the switch list by the State Belt Railroad to the carrier road, which transports it to its destination. If a car is moved between two points on the State Belt Line without delivery to any other carrier, it collects the switching charge from the

individual or industry requesting such movement. (R. 32–33.)

A large majority of the daily movements over the State Belt Railroad for the year ending December 30, 1925, were carload shipments of freight, (*a*) originating in States other than California and destined to consignees on the State Belt Railroad, or (*b*) originating on the State Belt Railroad and destined to consignees in States other than California. Many of the cars so handled during this period both originated in and were destined to points in States other than California. A considerable portion of the traffic so handled by it originated in or was destined to foreign countries. (R. 33.)

The State Belt Railroad is operated by the State of California for the purpose of facilitating commerce of the Port of San Francisco, without any profit being derived therefrom. The charges made for the services rendered by the line are made pursuant to the authority conferred by Section 2524 of the Political Code of California, which authorized collection of such an amount of revenue as would enable the appellants to perform the duties required of them by Article IX of the Political Code. (R. 34.)

The appellants were appointive State officers and constituted what under the State statutes was designated as the Board of State Harbor Commissioners. As such officers appellants had charge of

the administration of the Harbor of San Francisco and, in connection therewith, the administration of the State Belt Railroad, at the time during which the violations of the Federal Safety Appliance Act were alleged to have occurred. (R. 24–25.) They did not personally operate or immediately supervise the operation of the railroad. (R. 26, 28.)

All revenue received for services rendered by the State Belt Railroad is paid to the Board of State Harbor Commissioners. (R. 25.) The State laws provide that all moneys so collected shall be paid into the State Treasury at least once each month, and be credited to the San Francisco Harbor Improvement Fund, except so much thereof as may be necessary to pay specified operating expenses, including salaries and "incidental expenses." (R. 25–26.) All other sums of money paid by the Commissioners are paid by warrants drawn by the State Controller against any money in the State Treasury credited to the Harbor Improvement Fund. (R. 26.)

The State Belt Railroad is operated under the immediate supervision of a superintendent, who is appointed and holds office at the pleasure of the Board of State Harbor Commissioners and is under the supervision and control of that Board. (R. 26.) The inspectors, engineers, and yardmen employed in the operation of the State Belt Railroad are, except in cases of emergency employment,

civil-service employees of the State. (R. 26.) The inspectors in certain cases repair cars found to be defective under the requirements of the Federal Safety Appliance Act, and it is their duty to inspect all appliances covered by that Act. (R. 27.) Appellants did not personally participate in nor did they have any personal knowledge of the commission of the alleged violations of the Safety Appliance Act, and such violations, if any, occurred contrary to their orders and instructions. (R. 28.)

Prior to the trial and judgment in this case appellants had ceased to be State Harbor Commissioners and had been succeeded by new appointees. (R. 24, 40.)

SUMMARY OF ARGUMENT

I. The Safety Appliance Act and Supplemental Act of April 14, 1910, apply to "any common carrier engaged in interstate commerce by railroad." The State Belt Railroad is such a common carrier. It acts as a belt railroad connecting freight yards used by four interstate railroads with wharves on the San Francisco water front served by numerous interstate steamship lines. It accepts and transports all carload freight offered to it for movement between the railroad lines and the wharves, and vice versa. It also acts as a terminal company performing an essential part in the through interstate shipment of goods. It accepts and transports all carload freight moving to or from many industries

located along its line and originating on or destined to the lines of the connecting railroads. A large part of the freight transported by it originates in or is destined for States other than the State of California. The fact that the State Belt Railroad does not issue through bills of lading or that its property is owned by the State of California does not prevent it from being a common carrier engaged in interstate commerce. Its character as such a carrier is determined by the nature of its operations.

II. The suit against appellants to recover fines imposed under the Safety Appliance Act and Supplemental Act for permitting the movement in interstate commerce of cars with equipment not conforming to the standards prescribed by those Acts is not a suit against the State of California. That State did not and could not authorize appellants, as members of the Board of State Harbor Commissioners operating the State Belt Railroad, to violate laws of the United States regulating interstate commerce. The judgment against appellants did not require for its satisfaction any relief against the State; when the judgment was entered appellants no longer held office as State Harbor Commissioners.

Appellants were in law and in fact the operators of the State Belt Railroad and they were therefore within the term "common carrier" as used in the Safety Appliance Act. *United States* v. *Nixon*,

235 U. S. 231. It is no defense that the violations of the Act charged against appellants occurred without their knowledge or personal participation since the Act imposes an absolute liability on carriers subject thereto. Liability for a violation of the Act is not dependent upon proof of actual or imputed negligence.

Under the power to regulate interstate and foreign commerce, Congress may fine or penalize officers of a State for acts occurring while said officers are engaged in interstate commerce.

III. If the suit is in substance an action against the State of California, the rule of statutory construction that a statute does not apply to the sovereign unless expressly named therein is inapplicable because the limitations of this rule apply only to the *enacting sovereign*.

Even if the suit is against the State of California, the Safety Appliance Act gave the District Court jurisdiction. The original jurisdiction of cases in which a State is a party given to this Court by Article III, Section 2, Clause 2, of the Constitution is not exclusive. *Ames* v. *Kansas,* 111 U. S. 449. The specific provisions of Section 6 of the Safety Appliance Act giving United States District Courts exclusive jurisdiction of all suits to enforce the penalties therein provided modified the general provisions of Section 233 of the Judicial Code vesting, with some exceptions inapplicable here, exclusive jurisdiction in this Court of suits in which a State is a party.

ARGUMENT

I

THE STATE BELT RAILROAD IS A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE WITHIN THE MEANING OF THE SAFETY APPLIANCE ACT AND THE SUPPLEMENTAL ACT OF APRIL 14, 1910

Section 1 of the Safety Appliance Act (p. 36, *infra*) makes that Act applicable to "any common carrier engaged in interstate commerce by railroad." Section 1 of the Supplemental Act of April 14, 1910, makes that Act applicable to every common carrier subject to the Safety Appliance Act.

There seems little doubt that the State Belt Railroad is a common carrier. It runs along the San Francisco water front, connecting with approximately 45 wharves on one side and approximately 175 industrial plants on the other. It connects with the freight yards used by four railroads engaged in interstate commerce. It moves over its line all cars offered it by the four railroads, the steamship lines using the wharves, and the 175 industrial plants upon its lines. It transports all carload freight originating on the lines of the four connecting railroads or received by them from points beyond their lines and destined to either the industries or wharves along the State Belt Railroad. It likewise moves all carload freight from these industries and wharves destined to points on or beyond the lines of the four railroads. The industries and wharves in question are served exclusively by the State Belt Railroad. (*Supra*, pp. 4–9.)

The State Belt Railroad is a common carrier because it holds itself out as a link in the through transportation of freight carried by the railroads and the steamship companies which the State Belt Railroad connects. Such a belt line serving other common carriers and accepting all shipments offered is itself a common carrier. *Belt Railway Company of Chicago* v. *United States,* 168 Fed. 542 (C. C. A. 7th). In that case, as in this, the belt railroad made a freight charge per car which it collected from the railroads for which the services were rendered. It issued no bills of lading, did not participate in any through freight rates, and had no dealings with shippers.

The State Belt Railroad, in addition to functioning as a common carrier in its capacity as a belt railroad, also functions as a common carrier in its capacity as a terminal company serving the industries located on its line. It therefore falls within the decision of this Court in *United States* v. *Brooklyn Eastern District Terminal,* 249 U. S. 296, holding that a terminal company performing a switching service within the limits of a city between its docks and its team tracks and freight houses is a common carrier engaged in interstate commerce by railroad within the meaning of the Hours of Service Act. In that case as in this the terminal company did not own any of the cars which it hauled by its own locomotives and train

crews and it was paid for its services not by the shipper or consignee but by the railroad or steamship company for whose account the transportation service was performed.

Appellants attempt to distinguish this case on the ground that a greater transportation service was furnished by the Brooklyn Terminal Company than is furnished by the State Belt Railroad. The chief ground for such a distinction would seem to be that the Brooklyn Terminal Company issued through bills of lading, while the State Belt Railroad did not. But this could not have been considered a controlling factor since the Court referred to *Belt Railway Company of Chicago* v. *United States, supra,* as supporting its decision and, as previously stated, no through bills of lading were issued by the railroad there involved. Furthermore, in *United States v. Union Stock Yard* , 226 U. S. 286, this Court held that a stockyards company and a junction railroad connecting the stockyards with interstate common carriers, when both were held in common ownership, constituted common carriers by railroad engaged in interstate commerce and subject to the jurisdiction of the Interstate Commerce Act, although neither the stockyards company nor the junction railroad issued bills of lading. The Court said (p. 305):

> They are common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so

treated by the great railroad systems which use them. In *Union Stock Yards Co.* v. *United States,* 169 Fed. Rep. 404, Mr. Justice Van Devanter (while a Circuit Judge), speaking for the Court of Appeals, said (406):

> "* * * And it is of little significance that the stockyards company does not hold itself out as ready or willing generally to carry livestock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire a part of the transportation of every livestock shipment which they accept for carriage to or from that point, including such shipments as are interstate."

That the State Belt Railroad is not only a common carrier, but that it is engaged in interstate commerce is evident. It is admittedly a necessary connecting link in the through transportation of goods shipped in interstate and foreign commerce. (R. 29–31, 33.) In *Western Oil Refining Company* v. *Lipscomb,* 244 U. S. 346, 349, this Court said:

> Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it

> is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive.

Appellants also contend that because the State Belt Railroad is owned by the State of California and operated by Commissioners appointed by that State, and because it is not intended to earn a profit, it can not be *engaged in commerce.* They assert that regardless of the character of the State Belt Railroad if privately operated, it can not be held to engage in interstate commerce when operated by the State. But clearly, whether or not a railroad is engaged in commerce is determined by what it does and not by reference to the character of the owner of its property. A State may through its agents engage in a private business enterprise. *South Carolina* v. *United States,* 199 U. S. 437. And a State is not precluded by its sovereign character from operating through its agents a railroad, in which event the enterprise becomes a "private undertaking." *Georgia* v. *Chattanooga,* 264 U. S. 472, 481. Its purpose in either case must be related to some governmental function, but such purpose does not change the actual nature of the activity which it undertakes.

In *South Carolina* v. *United States, supra,* this Court held that where a State undertakes to control the sale of liquor by the dispensary system it engages in ordinary private business, which is not, by the mere fact that it is being conducted by a State, exempted from the operation of the taxing

power of the Federal Government. In that case this Court said (pp. 454, 455):

> Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal-revenue tax. If one State finds it thus profitable, other States may follow, and the whole body of internal-revenue tax be thus stricken down.
>
> More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. * * *
>
> We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. * * * If this change should be made in any State, how would that State contribute to the revenue of the Nation? * * *
>
> Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to

> practically destroy the efficiency of the National Government. * * * .

The paramount power of Congress with respect to the regulation of interstate commerce is elementary. If a State may not interfere directly with the operation of this paramount authority, it can not do so indirectly merely by taking over the operation of the instrumentalities of that commerce. Carried to its logical conclusion, the appellants' contention would result in the automatic loss of control by the Federal Government over all instrumentalities of interstate commerce which the State sees fit to acquire and operate. We submit that whether the State Belt Railroad is a common carrier engaged in interstate commerce must be determined by the nature of the actual railroad operations carried on without regard to the fact that the railroad is owned and operated by the State of California.

In *Mathewes* v. *Port Utilities Commission,* 32 F. (2d) 913 (E. D. So. Car.), it was held that a railroad operated by the Port Utilities Commission of the City of Charleston was a common carrier engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. In *McCallum* v. *United States,* 298 Fed. 373 (C. C. A. 9th), certiorari denied, 266 U. S. 606, the State Belt Railroad, on substantially the same facts as those here presented, was held to be a common carrier engaged in interstate commerce within the meaning of the Safety Appliance Act.

II

THE SUIT AGAINST APPELLANTS IS NOT A SUIT AGAINST THE STATE OF CALIFORNIA, AND APPELLANTS AS THE OPERATORS OF THE STATE BELT RAILROAD ARE LIABLE FOR VIOLATIONS OF THE SAFETY APPLIANCE ACT COMMITTED IN THEIR OPERATION OF THAT RAILROAD

Under many circumstances a suit against an officer of a State with respect to acts undertaken by virtue of his office is not a suit against the State. Thus a suit to restrain a State officer from enforcing an unconstitutional State statute or a constitutional State statute in an unconstitutional manner is not a suit against the State. *Ex Parte Young,* 209 U. S. 123, 150, 155; *Truax* v. *Raich,* 239 U. S. 33, 37; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 390–391. A suit against a State officer to recover damages caused by his failure to perform properly his official duties is not a suit against the State. *Johnson* v. *Lankford,* 245 U. S. 541. The basis for these holdings is that a State can not confer upon an agent authority to commit a tort so as to excuse the perpetrator; in such case the law of agency has no application; the wrongdoer is treated as the principal and is held individually liable for the damages inflicted. *Hopkins* v. *Clemson College,* 221 U. S. 636, 643. Upon the same principle the exemption of the United States from judicial process does not protect its officers and agents from being personally liable in tort to any person whose property rights have been wrong-

fully invaded, even by authority of the United States. *Belknap* v. *Schild,* 161 U. S. 10, 18.

Upon the authority of these and like cases the Circuit Court of Appeals for the Ninth Circuit in *McCallum* v. *United States,* 298 Fed. 373, certiorari denied, 266 U. S. 606, *supra,* held that a suit by the United States against the members of the Board of State Harbor Commissioners of the State of California to recover penalties for violations of the Safety Appliance Act committed in the operation of the State Belt Railroad was not a suit against the State of California and that the United States could recover against the Commissioners. The court in that case said (p. 374):

> It is conceded that the board is an agency of the state, and that as such it conducts the business of the state on the water front and manages the State Belt Railroad. But this is not a case in which the members of the board were acting within the power and duty vested in them by law, or in pursuance of authorization from the state. It is an action in tort to recover penalties for wrongful acts committed in violation of a law of the United States, not by the State, but by individuals acting as its servants. The state could not and did not authorize the commission of such wrongful acts, and immunity of the state from suit does not relieve state officers from responsibility for their unlawful action.

The Circuit Court of Appeals for the Ninth Circuit reaffirmed this decision in *Tilden* v. *United States,* 21 F. (2d) 967.

In light of the above authorities the contention of the appellants that "an action by or against a State officer as such is an action by or against the State" is, we submit, not sustained. Appellants cite on this point *Kentucky* v. *Dennison,* 24 How. 66, *In re Ayers,* 123 U. S. 443, and *Smith* v. *Reeves,* 178 U. S. 436. *Kentucky* v. *Dennison* was a proceeding on behalf of the State of Kentucky "by the direction and in the name of the Governor of the State" for a writ of mandamus against the Governor of Ohio to cause the latter to remove a fugitive of justice from Ohio to Kentucky. Although this Court held it had no authority to issue the writ, it said in that case that where the chief magistrate of a State is sued entirely in his official character the State itself might be considered a party on the record. This statement was apparently based on the practice then existing of bringing actions on behalf of a State in the name of the Governor (24 How. 66, 97) and is obviously not applicable to proceedings against other State officers. The other two cases cited held that suits brought against officers of the State where the State, though not named, was the real party against which the relief was sought and the judgment would operate, were proceedings against the State. Thus *Smith* v. *Reeves,* 178 U. S. 436, was a suit commenced in

the Circuit Court of the United States against the Treasurer of the State of California to recover the amount of certain taxes paid to the Treasurer, together with interest thereon, and was based on a statute of California permitting suit in the State court against the State Treasurer to recover taxes illegally assessed. In holding that the suit could not be maintained, this Court said (pp. 438–439):

> Although the State, as such, is not made a party defendant, the suit is against one of its officers *as Treasurer;* the relief sought is a judgment against that officer *in his official capacity;* and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint.

In *Smith* v. *Reeves* the State Treasurer had not done, or permitted to be done, anything outside the scope of his official duties. He had received certain taxes payable to him under the laws of the State. The liability for these taxes, if erroneously assessed, was a liability created by the laws of California chargeable against State funds. In the instant case, on the other hand, the suit is to enforce a liability created by a law of the United States and the wrong doing alleged—permitting cars to move in interstate commerce with apparatus not conforming with the standards prescribed by the

Safety Appliance Act—was not sanctioned by the State law. The judgment entered by the District Court was against the appellants individually and in the enforcement of this judgment no relief against the State will be necessary. To hold that under such circumstances appellants' wrong doing was the wrong doing of the State of California would be, as this Court said in *Johnson* v. *Lankford, supra,* p. 545, to assert that "whatever an officer does, even in contravention of the laws of the State, is State action, identifies him with it and makes the redress sought against him a claim against the State."

Although appellants were the duly qualified and acting State Harbor Commissioners during the times mentioned in the complaint, they had been succeeded in office by new Commissioners prior to the trial of the case. (R. 24–25, 39–40.) The fact that the District Court entered judgment against the appellants after they had ceased to be officers of the State is further evidence that the suit was regarded as one against the appellants individually.

Appellants contend that if the suit is not against the State of California, but against the appellants individually, they are not within the term "common carrier" as used in the Safety Appliance Act. *United States* v. *Nixon,* 235 U. S. 231, *supra,* held that a receiver operating a railroad under judicial appointment, was a "common carrier" within the meaning of the Quarantine Act of 1905, as amended

in 1913, and that as such common carrier the receiver was liable for the penalties prescribed for violation of the Quarantine Act. There seems no valid distinction between a receiver, who operates the property of a railroad company through appropriate agents, and appellants, who operated the property of the State Belt Railroad through a superintendent appointed by them and under their supervision and control. (R. 26.) We submit that appellants as the operators of the State Belt Railroad were a "common carrier" within the meaning of the Safety Appliance Act and that they did not cease to be within the Act because in the course of their operation a statutory liability was incurred which the State of California as the owner of the railroad property had not authorized.

Appellants also contend that they can not be held liable for violations of the Safety Appliance Act which occurred without their personal knowledge, against their consent and contrary to their orders and instructions. They rely on the holding in *Robertson* v. *Sichel,* 127 U. S. 507, that a public officer who is not personally guilty of negligence is not liable in an action for damages caused by the negligence of a subordinate officer.

We submit that the doctrine of *Robertson* v. *Sichel* is inapplicable here because the Safety Appliance Act imposes an absolute liability upon the carrier which is not dependent on the common law rule of reasonable care or the common law rule of liability of the principal for the acts of his agent.

St. Louis & Iron Mountain Ry. v. *Taylor,* 210 U. S. 281, was a suit against a corporation operating a railroad to recover damages for the death of one of its employees and the right of recovery was based solely on the defendant's failure to equip certain cars as required by the Safety Appliance Act. This Court held that the common law rule of reasonable care was not a defense where the cars used were not equipped as required by the Safety Appliance Act. It said (pp. 294–295):

> In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. * * * The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just.

In *Chicago, Burlington & Quincy Ry.* v. *United States,* 220 U. S. 559, this Court held that proof that a carrier had exercised reasonable care both in equipping its cars and in inspecting them was no defense to an action to recover penalties for violating the Safety Appliance Act.

The appellants further contend that the United States does not possess the power to fine or penalize officers of sovereign States for acts occurring in the regular performance by them of a governmental function. In support of this contention appellants

cite cases holding that State officers and agencies are not subject to Federal taxation. But this Court has held that the exemption of State agencies and instrumentalities from national taxation is limited to those which are strictly of a governmental character and does not extend to those used by the State in carrying on an ordinary private business. *South Carolina* v. *United States,* 199 U. S. 437, *supra.* In that case the Court held that where the State of South Carolina in the exercise of its police power had undertaken the control of the sale of all liquor in the State, it was engaging in an ordinary private business which was not exempted from the operation of the Federal taxing power.

If the Federal Government under its taxing power may tax State agencies and officers who are engaged in ordinary private business, it would seem to follow that under its commerce power it may fine or penalize State officers when they are engaged in interstate commerce. *Mathewes* v. *Port Utilities Commission,* 32 F. (2d) 913 (E. D. So. Car.), *supra,* held that Congress may make a municipality of a State liable for the torts of its agents when it is engaged in interstate commerce.

There is no evidence in the record, and it is not suggested by the appellants, that to require the State Belt Railroad to comply with the Safety Appliance Act would interfere with or impair the efficiency of the appellants in performing the functions which they are designed to perform or that

it would hinder the efficient exercise of any governmental function of the State of California. The paramount power of the Federal Government with respect to the regulation and control of interstate commerce is not lost, we submit, merely by virtue of the State taking over the instrumentalities of that commerce.

The appellants allege that to hold the State Harbor Commissioners personally liable for violations of the Safety Appliance Act would make it impossible to find competent persons to act as Commissioners. The suggested difficulty appears largely fanciful. This Court denied certiorari in *McCallum* v. *United States, supra,* on or before January 12, 1925. (266 U. S. 604, 606.) Nothing in the statement of facts filed in the present case on July 25, 1928 (R. 24), indicates that in the three and a half years intervening the State of California has experienced difficulty in obtaining competent Commissioners.

On the other hand, the purpose of Congress in enacting this legislation must be kept in mind. The Safety Appliance Act was obviously intended to minimize accidents and injuries to employees of all railroads engaged in interstate commerce irrespective of their ownership. There is no reason to suppose that Congress in enacting the Safety Appliance Act was less solicitous of the safety of the life and limb of employees of a common carrier

owned and operated by a State than it was of the employees of a carrier privately operated, or that it intended to exempt from the former the protection which it gave the latter.

In *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 17, this Court said that the primary object of the Safety Appliance Act was to promote the public welfare by securing the safety of employees and travelers and that this remedial aspect of the Act was more dominant than the punitive aspect involved in the $100 penalty provision recoverable in a civil action. In *Chesapeake & O. Ry. Co.* v. *United States,* 249 Fed. 805, 807 (C. C. A. 6th), certiorari denied, 248 U. S. 580, the court said that the Safety Appliance Act "being remedial and humanitarian in its purpose, is broadly construed."

III

ASSUMING THAT THIS IS A SUIT AGAINST THE STATE OF CALIFORNIA, THE SAFETY APPLIANCE ACT APPLIES TO THE OPERATIONS OF THE STATE BELT RAILROAD AND GIVES THE UNITED STATES DISTRICT COURT JURISDICTION OF THE SUIT

Appellants, alleging that this is a suit against the State of California, contend that the Safety Appliance Act does not apply to a State. *Guarantee Company* v. *Title Guaranty Co.,* 224 U. S. 152; *United States* v. *Herron,* 20 Wall. 251; *In re Fowble,* 213 Fed. 677 (D. Md.); and *Sullivan* v. *School District,* 179 Wis. 502, are cited as holding that a sovereign is not bound by the words of a

statute unless named therein. Each of these cases involved the application of a statute *against the enacting sovereign.* *United States* v. *Herron, supra,* p. 255, and *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239, point out that the historical basis for the principle relied upon by appellants is to be found in the English practice, where the Crown is held to be unaffected by legislation not specifically directed against it. The cases cited clearly indicate that the rule of statutory construction upon which appellants rely applies only to the enacting sovereign.

Assuming that a suit to recover penalties for violations of the Safety Appliance Act committed in the operation of the State Belt Railroad is a suit against the State of California, the Safety Appliance Act applies to "any common carrier" engaged in interstate commerce, and a common carrier owned and operated by a State is therefore within the express terms of the Act. No rule of statutory construction calls for a different result. Considerations of the purpose of Congress in enacting this legislation and of the liberal construction to be given this remedial statute (*supra,* pp. 29–30) also lead to the conclusion that the Safety Appliance Act applies to the operators of the State Belt Railroad.

Appellants contend that if the suit is against the State of California, the United States District Court had no jurisdiction.

Article III, Section 2, Clause 2, of the Constitution provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

In *Ames* v. *Kansas,* 111 U. S. 449, *supra,* this Court held that under the foregoing provision of the Constitution the jurisdiction of this Court was not exclusive and that Congress could give a lower Federal court jurisdiction of a case in which a State was a party plaintiff although the State contested removal of the case to a lower Federal court, as authorized in a removal Act adopted by Congress. The basis for the decision was the construction which Congress, within six months after the inauguration of the Government under the Constitution, placed upon this constitutional provision in the Judiciary Act of 1789. Section 13 of that Act, c. 20, 1 Stat. 73, 80, now Section 233 of the Judicial Code (U. S. C., Title 28, sec. 341), provides:

> That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other

> states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. * * *

The Constitution thus gave this Court original jurisdiction in all cases in which a State "shall be party" and the Judiciary Act of 1789 followed this terminology in providing that in all civil controversies where a State "is a party" this Court shall have *exclusive* jurisdiction in certain such cases and *original,* but not *exclusive,* jurisdiction in other such cases.

We submit that Congress, having power under the Constitution to give the lower Federal courts jurisdiction of a suit against a State, has by Section 6 of the Safety Appliance Act given the District Court jurisdiction of the present cause of action, even if it is regarded as a suit against the State of California. Section 6 of the Safety Appliance Act, as amended, pp. 36–37, *infra,* provides a $100 penalty for a violation of any of the provisions of that Act—

> to be recovered in a suit or suits to be brought by the United States district attorney in the

> district court of the United States having jurisdiction in the locality where such violation shall have been committed.

This section in terms applies to all suits brought to recover such penalties, and the exclusion of such suits if a State-operated railroad is involved seems unwarranted. Congress would scarcely have required that this Court be vested with original jurisdiction of suits to collect penalties for minor infractions of the Safety Appliance Act. Moreover, the statutory liability created is recoverable only by a suit in a District Court. If suits for penalties against Commissioners operating a State-owned railroad are regarded as suits against the State, denial of the jurisdiction of the District Court would mean that although Congress had created a penalty for violations occurring in the operation of such a railroad, it did not give any court jurisdiction to enforce the penalty.

Assuming that this suit is one against the State of California, we submit that the provisions of Section 6 of the Safety Appliance Act giving United States District Courts exclusive jurisdiction of suits to recover the penalties therein provided must be regarded as modifying the prior general provisions of Section 233 of the Judicial Code in all cases where a common carrier engaged in interstate commerce, but owned and operated by a State, has been guilty of an infraction of the Safety Appliance Act.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be affirmed.

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Solicitor General.

JOHN LORD O'BRIAN,
The Assistant to the Attorney General.

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PAUL D. MILLER,
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OCTOBER, 1930.

APPENDIX A

STATUTES INVOLVED

The Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531 (U. S. C., Title 45, Secs. 1, 2, and 6), provides in part as follows:

> SEC. 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad * * *.
>
> SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.
>
> * * * * *
>
> SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such

> district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided,* That nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. (As amended by the Act of April 1, 1896, c. 87, 29 Stat. 85.)

The Act of March 2, 1903, c. 976, 32 Stat. 943 (U. S. C., Title 45, Sec. 8), amended the Safety Appliance Act of March 2, 1893, by enacting that the "provisions and requirements" of the latter Act "shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type."

The Act of April 14, 1910, c. 160, 36 Stat. 298 (U. S. C., Title 45, Secs. 16, 11, 12, and 13), supplementing the Safety Appliance Act of March 2, 1893, provides in part as follows:

> SEC. 1. That the provisions of this Act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."

SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided,* That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

SEC. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act * * *. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of draw bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission.

SEC. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: * * *.

APPENDIX B

An order of the Interstate Commerce Commission, dated October 10, 1910, with respect to the standard height of drawbars provides:

> Whereas by the third section of an act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes', and other safety appliance acts, and for other purposes," it is provided, among other things, that the Interstate Commerce Commission is hereby given authority, after hearing, to modify or change and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and
>
> Whereas a hearing in the matter of any modification or change in the standard height of drawbars was held before the Interstate Commerce Commission at its office in Washington, D. C., on June 7, 1910,

Now, therefore, in pursuance of and in accordance with the provisions of said section 3 of said act,

It is ordered, That (except on cars specified in the proviso in section 6 of the safety appliance act of March 2, 1893, as the same was amended April 1, 1896) the standard height of drawbars heretofore designated in compliance with law is hereby modified and changed in the manner hereinafter prescribed, to wit: The maximum height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the centers of drawbars for standard-gauge railroads in the United States subject to said act shall be 34½ inches, and the minimum height of drawbars for freight cars on such standard-gauge railroads measured in the same manner shall be 31½ inches, and on narrow-gauge railroads in the United States subject to said act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 26 inches, and the minimum height of drawbars for freight cars on such narrow-gauge railroads measured in the same manner shall be 23 inches, and on 2-foot-gauge railroads in the United States subject to said act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 17½ inches, and the minimum height of drawbars for freight cars on such 2-foot-gauge railroads measured in the same manner shall be 14½ inches.

And it is further ordered, That such modification or change shall become effective and obligatory December 31, 1910.

U. S. GOVERNMENT PRINTING OFFICE: 1930

SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1930.

William A. Sherman, M. F. Cochrane, and J. B. Sanford, vs. The United States of America.	On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[November 24, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

This case comes here on a certificate of questions of law from the judges of the Circuit Court of Appeals for the Ninth Circuit. Subsequently the entire record was brought up, but the facts sufficiently appear in the certificate and both they and the questions may be abbreviated here. The suit is brought by the United States against the appellants by name, described as 'constituting the Board of State Harbor Commissioners of the State of California, operating The State Belt Railroad', to recover penalties for alleged breaches of the Safety Appliance Acts. March 2, 1893, c. 196, 27 Stat. 531; April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943; April 14, 1910, c. 160, 36 Stat. 298. U. S. Code, Tit. 45, §§ 1, 2, 6, 8, 11, 12, 13, 16. The penalties are imposed upon 'any common carrier engaged in interstate commerce by railroad,' and the broad question is whether the defendants are liable under the Acts.

The matters complained of occurred upon what is known as the State Belt Railroad. The road is about five miles long, within the City of San Francisco, runs nearly parellel with the water front of the harbor, and connects many industrial plants and the line of the Southern Pacific Railroad Company with wharves belonging to the State and through the wharves with other common carriers engaged in interstate commerce by railroad. It may be assumed that the work done upon the Belt Line was interstate commerce. But the line belongs to and is operated by the State; the work is

done without profit for the purpose of facilitating the commerce of the port, and the funds received after paying expenses go to the Treasury of the State to the credit of the San Francisco Harbor Improvement Fund. California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor—a State prerogative. Cal. Political Code, § 2524. The defendants are officers of the State charged with the administration of the Harbor of San Francisco and of the State Belt Railroad in connection therewith. They had no hand in or knowledge of the alleged violations of law, the immediate supervision being the duty of an inspector appointed by them, and his subordinates being Civil Service employees of the State.

On these facts in our opinion the statute, if it applies to anyone, can apply only to the State. The suit is not to recover damages for a tort, which, if a wrong on the part of the master is at least equally a wrong on the part of the servant who personally is guilty of the act or omission that caused the harm. Here the suit is for a penalty attached to an offence—and the only party on whom the liability is imposed is the common carrier. The statute is not like the Hours of Service Act of March 4, 1907, c. 2939, § 3, 34 Stat. 14, 15. Code, Title 45, § 63; that in terms extends the liability to officers and agents. It seems to us plain that as between the Board of Harbor Commissioners and California the carrier here is the State, by which it is agreed that the Road was owned and operated, which received such pay as was required for the work that was done, and which did the work for the purpose of facilitating the commerce of its principal port. The principal and its agents cannot both be the common carriers aimed at. One is and the other is not subjected to the penalty. One is superior the other inferior. The superior is the one that operated the road and the one whose commands the others were bound to obey.

The suit is brought against the appellants individually. This is conceded by the Government and sufficiently appears from the declaration and from the judgment against them by name, entered after they had ceased to be members of the Board. Manifestly if we are right in what we have said the judgment is wrong and we are relieved from the duty of considering whether the Safety Appliance Act should be construed to embrace the State.

An answer to other questions proposed is unnecessary because of our conclusion that the judgment against the defendants cannot be sustained.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.